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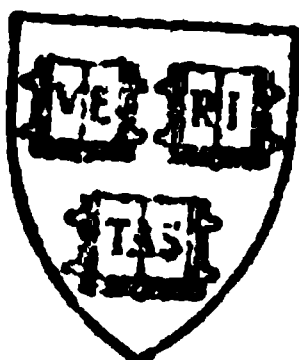
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HAWAIIAN REPORTS
VOLUME 15.

CASES DECIDED

IN THE

Supreme Court of the Territory of Hawaii

May 21, 1903, to June 4, 1904

HONOLULU:
THE BULLETIN PUBLISHING COMPANY, LTD.
1904.

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OF THE
SUPREME COURT OF HAWAII

DURING THE TIME OF THESE REPORTS:

CHIEF JUSTICE,

HON. WALTER FRANCIS FREAR.

ASSOCIATE JUSTICE,

HON. CLINTON A. GALBRAITH.

ASSOCIATE JUSTICE,

HON. ANTONIO PERRY.

ATTORNEY GENERAL DURING THE PERIOD COVERED BY THIS VOLUME,

HON. LORRIN ANDREWS.

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CASES DECIDED

BY THE

SUPREME COURT

OF THE

TERRITORY OF HAWAII.

IN RE ASSESSMENT OF TAXES, JAMES B. CASTLE.

APPEAL FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED MARCH 26, 1903.

DECIDED MAY 21, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

"Full cash value" under the tax law means the value for purposes of sale, if the property is salable, and not either the value to the owner or the cost of reproduction.

OPINION OF THE COURT BY FREAR, C.J.

The taxpayer returned his residence at Waikiki at \$25,000 for the land and \$60,000 for the improvements. The assessor raised the valuation of the land to \$29,100, in which the taxpayer acquiesced, and the valuation of the improvements to

\$100,000, from which the taxpayer appealed to the Tax Appeal Court, which placed the value of the improvements at \$75,000, from which the assessor appeals to this court.

The improvements, consisting chiefly of the dwelling house, cost about \$150,000, are comparatively new, insured for \$85,000, and apparently it would cost about the same amount to replace them. A number of witnesses, real estate agents and prominent business men, seem to agree that the improvements should not be valued at more than \$60,000 for purposes of sale. The house is worth most as a residence. It would not bring much as an investment.

Under the statute (Civ. L., Sec. 820) it must be assessed at "its full cash value". If such value is what it could reasonably be expected to bring at a sale, the Tax Appeal Court did not, in our opinion, err in not placing the valuation at a larger amount.

It seems to us that the salable value is the true test of the full cash value, and that, we believe, has been hitherto assumed by bench and bar in cases that have come before this court, that is, when, as here, there is nothing to prevent a sale. Of course, when there is something to prevent a sale, as in the case of a non-assignable leasehold interest, some other test might be adopted, as, for instance, what the property would be worth if it were salable. See *Knudsen v. Stoltz*, 8 Haw. 81; *State v. Halliday*, 61 Oh. St. 352. To test the value in cases like the present by what the property is worth to the owner or at its cost of reproduction rather than at its market value would not only not be sound, but would often be exceedingly difficult and uncertain.

The only question on this appeal is whether the valuation fixed by the Tax Appeal Court is less than the full cash value. In our opinion, on the evidence, it is not, and therefore that valuation is affirmed.

Robertson & Wilder for assessor.

W. R. Castle for taxpayer.

In re TAX ASSESSMENT OF HONOLULU RAPID
TRANSIT and LAND COMPANY, Limited.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

SUBMITTED MARCH 26, 1903.

DECIDED MAY 21, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The valuation of the property of the Honolulu Rapid Transit and Land Company, Limited, as of January 1st, 1902, at \$409,000.00, by the Tax Appeal Court is, on the evidence, affirmed.

OPINION OF THE COURT BY GALBRAITH, J.

This is an appeal by the Honolulu Rapid Transit and Land Company, Lt'd., from the decision of the Tax Appeal Court, fixing the valuation of its property for Taxation purposes as of January 1, 1902. The return of the Company placed the aggregate value of its taxable property at \$266,730.00. This amount was increased by the assessor to \$509,500.00 and the Tax Appeal Court reduced it to \$409,000.00. The difference between the valuation given in the return and that fixed by the Tax Appeal Court (\$142,270.00) is the amount involved in the appeal.

The taxpayer returned specific items of property that it claimed was subject to taxation without returning any value for its franchise. It also contends that a part of its property of the aggregate value of \$65,000.00 is exempt from taxation under section 30, Act 69, Laws of 1898—the law granting its franchise, but does not set out in the return the amount or character of property claimed to be exempt under this section.

MAY, 1903.

The Tax Court found that the Assessor was justified in making the assessment on the basis of an "enterprise for profit" under Sec. 871, Civil Laws, and found "that deduction must be made under Sec. 30, Laws of 1898, for material and supplies not in use". "The Court further finds that a reduction of 20 per cent. on market price of stock is reasonable under the conditions of January 1st, 1902, and appraises value as follows:

Stock \$236,250 (less 20%)	\$189,000 00	
Bonds \$300,000 (less 5%)	285,000 00	
		<hr/>
		\$474,000 00
Material and supplies not in use . . .		65,000 00
		<hr/>
		\$409,000 00

"The Taxable value in this case is fixed at the above figure of \$409,000."

The evidence fails to show that the valuation of the property by the Tax Appeal Court was excessive or more than the full cash value thereof at the date of the assessment and the same is therefore affirmed. It is so ordered.

W. R. Castle for Taxpayer.

Robertson & Wilder for the Assessor.

IN RE JOHN F. COLBURN.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED MARCH 27, 1903.

DECIDED MAY 28, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An award of the Fire Claims Commission of \$5,835 under claim 2703 as follows, viz: "without qualification, \$505, subject to interest of claim 240, \$2,680", and similarly subject to other claims, the several claimants being interested as landlord and tenants of the same property, is not all payable to the holder of claim 2703.

OPINION OF THE JUSTICES BY FREAR, C.J.

This is one of several cases appealed from decisions of the Auditor refusing to issue warrants for the first instalment of 10 % payable on awards of the Fire Claims Commission. See the next following two cases; also *Ins. Co. v. Commissioners*, 14 Haw. 481. It does not appear just what the form of the award was, but it appears that a certificate signed by the clerk of the Commission was issued containing the following:

“Judgment Award No. 2703—\$5835.

“It is hereby certified that the above amount is the correct award as per record of judgments. See slip attached:”

The slip attached contains the following:

“Awarded without qualification.....	\$ 505 00
“ subject to interest of Claim No. 240.....	2680 00
“ “ “ “ “ 6676.....	500 00
“ “ “ “ “ 2936.....	1745 00
“ “ “ “ 6449-2936.....	325 00
“ “ “ “ “ 6449.....	100 00
	<hr/>
	\$5835 00

“Awarded to Claim No. 6640, subject to the interest of this Claim No. 2703, the sum of \$2655.00.

“\$1050.00 of the above amount of \$2650.00 is subject to int. of Claim 629.”

The appellant, claiming to be the awardee in No. 2703, contends that he is entitled to the whole \$5835, and therefore to the whole of the first instalment of 10%, and that the words “subject to the interest of,” &c., should be disregarded as surplusage or else that they merely make the appellant a trustee for the holders of the other claims to the amounts named, in which latter case, as he contends, they can look to him for their shares after the whole has been paid to him. The Auditor contends that he should not issue a warrant without receipts from all the claimants or an order from the court.

There is nothing in this certificate to show who the claimants, other than the appellant, were, or what their relations to each other were, or just what was meant by the words "subject to interest of." But we gather from other statements in the appeal, which are not controverted, that the appellant's claim was for a loss as owner of the land on which the building that was burnt stood, and that claims 629 and 6676 were by others for losses as lessees of the same land. It does not appear who the other claimants were, but apparently they and the appellant have made an amicable settlement.

In the absence of the awards themselves and perhaps the rest of the records it is difficult to say just what the true situation is. On the statement of the appeal before us we cannot take either view contended for by the appellant.

It looks very much as if the Commission, instead of making a separate award to each claimant, bunched together all the claims arising out of the destruction of one piece of property and made an award of all such claims under the number of the claim of the owner of the fee, adopting the method pursued in this award of signifying in what way the amount awarded was to be divided among the several claimants. If so, either the award should be considered as embodying several awards to the several claimants, so as to entitle each claimant as an awardee to the amount indicated, or the award should be regarded as making the principal claimant trustee for the others, or it should be regarded as void for uncertainty, in any of which cases the Auditor rightly declined to issue a warrant for the whole to the claimant who now appeals. The references to the other claims certainly cannot be treated as surplusage. It is clear that the Commission did not intend that this claimant should have the whole amount, even if it had jurisdiction to make an award to one claimant for other claimants. And whether these references should be considered as separate awards to the holders of the claims referred to or as making the appellant a trustee for them to the extent of those amounts, the Auditor was certainly justified in declining to issue a warrant

for any such amount without the authority of the person claiming it. Even if the award might properly have been made to one for the others, its payment could not properly be made to one for the others, without the consent of the latter.

What was meant by the clause making another award (6440) subject to this claim (2703), or by the clause making a portion of one amount named subject to still another we need not undertake to say. We may note also that the amount certified to (\$5835) is not the correct total of the several amounts named. On the meager facts before us we must hold that the Auditor was justified in declining to issue a warrant for the whole amount to this appellant.

Appeal dismissed.

Attorney General L. Andrews for Auditor.

C. W. Ashford for appellant.

IN RE EN SYAK ASEU.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED MARCH 27, 1903.

DECIDED MAY 28, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A claimant is not entitled to a warrant for the entire amount upon a certificate from the Fire Claims Commission that a certain amount is the correct award, when the certificate also states that that amount is correct "as per record of judgments" and that it was "made subject to the interest of" another claim.

OPINION OF THE JUSTICES BY FREAR, C. J.

This case is much like the *Colburn* case, just decided, *ante* p. 4. The Certificate sets forth: "Judgment award No. 1256, \$2750. It is hereby certified that the above amount is the correct award as per record of judgments. The above award made subject to the interest of claim No. 619." From the statement of the appeal it appears that the holder of claim 619 was one Ly Keau, but what the nature of the claim was does not appear. Its amount was \$11,000.

The case differs from the *Colburn* case principally in that no amount is named for claim 619. This would seem to be an additional reason for looking to the original award or records for an explanation. It may be that the Commission intended to make an award on claim 1256 only, subject, however, to the amount of 619, whatever the latter might be, and to leave it to the two claimants to have their respective interests or rights determined as between themselves in a regular court of law or equity. It may be, too, that that was the intention even though in the original record of judgments an amount was set forth in the qualifying clause. If so, it would seem that the Commission did not do its duty under the statute and ought now to proceed to adjudicate each claim. But it may be that that was not the intention. In the *Colburn* case the language "subject to the interest of" was the same, but definite amounts were set out for the respective claims. In this case the amount may have been set forth in the award and omitted inadvertently in the certificate, or it may have been omitted inadvertently in the award. If omitted in the award, that may be void for uncertainty or incompleteness; if set forth in the award (1256) either that would be void for uncertainty in not disclosing whether the amount set forth is that of the award or that of the claim 619, or, if not void for that reason, it must be considered an award to En Syak Aseu in trust, as to a part, for claimant 619, or else as constituting two separate awards.

In any event we cannot say that the certificate alone shows that this appellant was intended to have the entire amount, much less that on this certificate alone which refers to the "record of judgments" and expressly states that the award is "subject to the interest of claim 619," the Auditor was obliged to issue a warrant for the entire amount to this appellant.

Appeal dismissed.

C. W. Ashford for appellant.

Attorney General L. Andrews for Auditor.

IN RE ROYAL INSURANCE COMPANY.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED MARCH 27, 1903.

DECIDED MAY 28, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A statement in an award made by the Fire Claims Commission to the owner of destroyed property, that the award was made subject to the subrogation of that claimant to an insurance company, giving the name of the company, the number of the policy and the amount, cannot be considered as an award of that amount to the company so as to entitle it as an awardee to a warrant therefor.

OPINION OF THE JUSTICES BY FREAR, C.J.

This is another of the cases appealed from the refusal of the Auditor to issue a warrant on an alleged award of the Fire Claims Commission. See last preceding two cases.

In this case the appellant insurance company had paid to the owner of the destroyed property \$525 in settlement of an insurance policy thereon and taken an assignment of his claims

MAY, 1903.

against any wrongdoer to that amount. The owner filed a claim for \$5077.17 1-2 with the Commission, and the insurance company filed a claim for \$525. An award was made as follows on the claim filed by the owner:

“\$415.

Date Judgt.	Filing Claim.	Claimant.	Property.
“Apr. 15, 1902.	July 15, 1901.	Kwong Tai Loy.	Personal Prop. Merchandise. \$5077.17 1-2.

“Upon the hearing herein it was found that the claimant was the owner of the property claimed and that the same was lost, damaged and destroyed in Honolulu under orders of the Board of Health or in consequence thereof in the suppression of Bubonic Plague.

“And upon the evidence adduced there is hereby awarded upon this claim the sum of two thousand eight hundred and eleven, 65-100 dollars.

“\$2811.65.

“This claimant having subrogated to the following Ins. Co., to wit:

Name of Ins. Co.	No. of Policy.	Amount.
“The Royal Ins. Co.	4861195.	\$525.

“This Award is hereby made subject to the subrogation of this claimant to said Company.”

The facts of this case are much like those in the *Liverpool, etc., Ins. Co.* case, 14 Haw. 481, but the relief sought is different. In that case the contention was that no award had been made to the insurance company and the court was asked to compel the Commission to make an award by mandamus. Here the contention is that the award, though in the same form as in that case, should be construed as containing an award to the insurance company to the amount indicated and an award of the balance to the owner, and that the insurance company

should be paid first. It does not appear whether, in this case as in that, the Commission first deducted the amount of insurance, on the theory that the owner had already been compensated to that extent, and then attempted to make the balance subject to the same amount, on the theory that the owner had expressly assigned so much of his claim to the insurance company. If it did, the injustice in the result is apparent.

What does the award mean? Even if it means as contended by the insurer, that one award was made to the insured for \$525 and another to the insurer for the balance of the total amount awarded, it would not follow that the insured would be entitled to priority in payment. The most that could reasonably be contended would be that payment should be pro rata, whether under general law (see *Moore's Appeal*, 92 Pa. St. 309; *Scobis v. Ferge*, 102 Wis. 122 or by the express language of the Fire Claims Act (Laws of 1901, Act 15, Sec. 10). The assignment did not give the assignee any priority of right. It merely purported to put the assignee in the place of the assignor as to a part of the claim. Nor did nor could the award give the assignee priority of right. Perhaps this would technically be sufficient to dispose of the case, since no demand has been made on the Auditor for a warrant for a *pro rata* of the 10% available. The demand apparently was for a warrant for the whole \$525 even though that exceeded not only the *pro rata* but the entire 10% available. But the statute allowing appeals from the Auditor (Laws of 1898, Act 36, Sec. 16) indicates that cases of this kind should not be hampered with technicalities in modes of procedure.

There is more reason to suppose that the Commission intended to make the entire award to the owner in this case and merely noted that it was subject to the subrogation or assignment, whatever that might be, leaving it to the parties to settle their rights between themselves, than there was to suppose in the *Colburn* case (*ante* p. 4) that the Commission meant to make one award to the owner and merely note that that was subject to the interests of the lessees, &c., for, not only are the

awards in the two cases worded differently, but in the *Colburn* case the lessees had independent rights of their own upon which they were entitled to awards, while in this the assignee had no such right. In the present case at least it is not clear that a direct award was intended to be made to the insurance company. The award is made to the owner but expressed to be subject to the subrogation, that is, presumably, to whatever rights that may give. Just what the Commission mean it might be possible to say from the examination of the rest of the record in the cases of the two claims in question, and perhaps from the practice of the Commission in other cases, but, as it is, it is difficult to say from this award alone. At any rate, in our opinion the Auditor was justified under the circumstances in declining to issue a warrant for any portion of the award to this appellant. We feel that we would not be justified in the absence of further evidence, in saying that the appellant is entitled to anything by the express provisions of this award. The Auditor is entitled to clear proof of the validity of a claim before issuing a warrant therefor and it is incumbent upon the claimant to furnish such proof.

It not appearing clearly from the facts presented that the Auditor ought to issue the warrant desired, the appeal is hereby dismissed.

Robertson and Wilder for the appellant.

Attorney General L. Andrews for the auditor.

W. A. Whiting and C. F. Clemons for the owner.

IN THE MATTER OF THE ESTATE OF JOSE A. da
SILVA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 27, 1903.

DECIDED MAY 28, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Assuming that a final order of distribution may be revoked in probate on motion and that such an order of revocation is not final for the purposes of appeal by the parties aggrieved thereby, still an attorney of one of the parties cannot properly, as an incident to such order of revocation, be required to pay into court to await further proceedings a sum paid by his client to him as his fee out of the amount so distributed to such client, and such an order is final for the purposes of appeal and the attorney may appeal therefrom in his own right.

OPINION OF THE COURT BY FREAR, C.J.

It is not altogether easy to say what ought to be done in a case like this, the record in which teems with irregularities, if not reversible errors, from beginning to end. After distributing half the estate to Thomas Fitch, attorney-at-law for the decedent's widow, a resident of British Guiana (why distribution should be made to the attorney-at-law rather than to the heir does not appear), the Circuit Judge allowed time to produce evidence of other heirs,—upon the expiration of which time, such evidence not being produced, the remaining half was distributed to the same attorney. Some time afterwards evidence was received as to the existence of a sister of the deceased in Madeira, whereupon the attorney in fact of both the widow and sister (not the widow and sister themselves by their attorney)

moved the judge to modify the second order of distribution (without suggesting in what respect) and also to fix the fees of the attorney at law of the attorney in fact (not of the widow and sister) in the matter "for the revocation of the administrator" of the estate. (Why the attorney of the widow should ask for a modification of an order distributing the whole estate to her, when, if she wished the sister to get her share, she could pay it over to her, does not appear. Why the attorney in fact should act for both widow and sister, if their interests were adverse, also does not appear. Why he should ask for a modification or revocation of the final order for the purpose of having the fees of the attorney at law fixed, and why he should ask the judge to fix those fees at all, they being a matter of private arrangement, also does not appear.) Apparently the attorney in fact after settling with the attorney at law, in accordance with what was their construction of a special contract as to fees, came to the conclusion that under that construction the fees exceeded what the services were worth, which was very likely the case. The Judge thereupon revoked the second order of distribution on the ground that the widow was not the sole heir and directed the attorney at law (not the widow) to pay into court to "await further proceedings" the sum (\$486.76) paid under that order. Later, on the same day, on a showing that a part of that sum (\$229.16) had been paid by said attorney to the attorney in fact, he modified the order and directed the attorney at law to pay in only the balance (\$257.60). It is from this last order that the attorney at law appeals. The Judge also directed the attorney in fact of the widow to pay in the \$229.16, but afterwards directed this sum to be paid back to him on the ground that he was authorized to keep it as attorney in fact for the sister, and that the order to pay it into court was inadvertently made. (Why the money should be ordered paid to the attorney in fact of the sister before the proposed further hearing as to whether she was entitled to it and before any adjudication to that effect does not appear.)

Whether a final order of distribution can be revoked on motion in probate, in the absence of fraud or mistake, it is

unnecessary to decide. Whether such an order of revocation is final for the purposes of appeal, it is also unnecessary to decide. No such appeal is brought here by any party shown to be entitled to appeal. Neither the widow nor the sister appeals. The appeal is taken solely by the attorney at law of one or both of the interested parties, and he appeals in his own right. He, of course, could not appeal from an order against his client, such as an order opening the decree of distribution. But he may appeal as a party in interest from the order to pay money into court, on the theory that the amount ordered to be paid had been retained by him as his fee in settlement with his client, that is, as if he had paid over to the attorney in fact of the widow the entire amount received from the court and had been paid back the amount of his fee. We had some doubt at first, on account of the unsatisfactory state of the record, whether it was sufficiently clear that a settlement had been made between the attorney at law and his client, so as to vest the sum retained by the former in him in his own right, but on the whole we think that is shown to be the fact, and therefore the attorney at law is entitled to appeal from the order in his own right. The order to pay money into court is final for the purposes of appeal as to him. Indeed, this would seem to be a case of want of jurisdiction to make the order rather than of mere error. What authority was there to order a third party to pay into court a sum of money of his own in a case in which he had no interest and to which he was not a party, and the fact that the order was also to "await further proceedings" did not make it interlocutory so as to preclude an appeal. A judge cannot order people at random to pay money into court to await his pleasure. The attorney was clearly entitled to the possession of the money as against the court, and an order depriving him of that possession would be final for the purposes of appeal as much as an order depriving him of the possession of a tract of land belonging to him would be. There was moreover no intimation as to what was to be done with the money or what further proceedings it was to await. Apparently the order was an adjudication that as between the

attorney and the estate the money belonged to the estate and that was final as to him for the purposes of appeal. He was deprived of a substantial right—not only of the right of possession but of the right of property as well. If he should get any of it back, so far as this order contemplated, it would be as an incidental result of a further distribution of the estate.

The order appealed from is reversed and the case remanded to the Circuit Judge for further proceedings consistent herewith.

Henry E. Highton for appellant.

Geo. A. Davis for defendant.

DISSENTING OPINION OF GALBRAITH, J.

I am convinced that the appeal should be dismissed and therefore do not concur in the judgment of the majority of the court.

On November 25, 1901, a Circuit Judge of the First Circuit Court, sitting in Probate, adjudged the surviving widow, Antonia da Silva, to be the sole heir of the deceased, Jose da Silva, and made an order of final distribution of the estate, directing the clerk of the court to pay to the attorney of the widow, Thomas Fitch, Esq., all of the money in his hands belonging to the estate. There was paid to the attorney under said order the sum of \$486.76. There was presented in said cause on January 24, 1902, a motion asking that the order of distribution be modified and that the compensation claimed by Thomas Fitch, Esq., be fixed by the court. A showing was made in support of the motion that a sister and heir of the deceased had been discovered since the making of the order of distribution. In response to said motion the Circuit Judge, on March 6, 1902, ordered that the decree of final distribution be set aside on the ground that it had been made to appear that Jacintha da Silva was a sole surviving sister of the deceased and that the widow was not the sole heir and "further ordered that the sum of \$486.75 paid over to Thomas Fitch on or about November 25, 1901, be forthwith paid into court to await fur-

ther proceedings in said matter." On the application of Mr. Fitch the Judge modified this order so that he was directed only to pay \$257.60 into court. From this modified order Fitch appealed.

The order appealed from was clearly interlocutory and not final and not an appealable order under the practice in this jurisdiction. *Brown v. Carrvalho*, 9 Haw. 180; *Barthrop v. Kona Coffee Co.*, 10 id. 398, 401; *Government v. Smith*, 9 id. 178; *Government v. Ah Sin*, 9 id. 164; *The Queen v. Poor*, 9 id. 399, 401; *Humburg v. Iwamoto*, 13 id. 702.

It has been held by this Court that an order of a probate court revoking an order of final distribution is not a final order and is not appealable. *In re Banning Estate*, 9 Haw. 357. The same ruling has been made in Indiana and California. *Wood v. Wood*, 51 Ind. 141, 142; *Estate of Michael Calahan*, 60 Cal. 232; *Estate Dean*, 63 Cal. 613. This is sufficient reason why the appeal ought to be dismissed.

The money was in the appellee's hands not by virtue of a settlement with his client but by virtue of the order of the Probate Court directing it paid to him,—the order of November 25, 1901—the same order that was revoked and set aside by the order appealed from. This fact is a complete answer to the contention that the court had no power to make the order of revocation. The power that gave could take away. Again the general and inherent power of the court over its orders and judgments was ample to justify the order complained of. That the appellee, who was ordered to repay the money, was a "third party" and not a party to the suit did not lessen the power of the court over him in this instance. He appeared in the proceedings as an attorney of record for some parties of varied interests in the proceeding and induced the court to make the order directing the payment to him of the money ordered returned into court. It is hardly a proper use of terms to designate him as a "third party." A review of the record will possibly justify the conclusion that he was about "first party" all through the proceedings, including the entry of the order of final distribution.

The revocation of the order of final distribution and directing the appellee to pay the money into court was equivalent to granting a rehearing of the order of final distribution. The parties and the money were left in the same relative position to the court that each occupied prior to the passing of the order of final distribution. The matter stood as if that order had never been made. How can this court at this stage of the proceedings tell whether or not the court of probate will err in the final order in the case, or in the further proceedings to be had in the case? This court cannot presume that the court below will so deal with the parties and the money that there will be any dissatisfaction. The appellee may obtain by the final order all that he wants and be satisfied with it. At any rate until that order is made he can have no standing in an appellate court.

IN RE ASSESSMENT OF TAXES, OAHU COLLEGE.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

SUBMITTED APRIL 20, 1903.

DECIDED MAY 29, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

It is not necessary to make return for purposes of taxation of property which, by virtue of the provisions of Section 836, C.L., is not subject to taxation, nor to claim in the tax return that such property is exempt.

A failure to make return and claim of the exemption to the assessor is not a waiver of the right to demand the benefit of the statute. The valuation of \$25,000.00 placed on the property by Tax Appeal Court is affirmed.

OPINION OF THE COURT BY GALBRAITH, J.

(Frear, C.J., dissenting.)

This appeal was taken by the Tax Assessor from the decision of the Tax Appeal Court fixing the valuation on the property of the Oahu College located on Miller Street, Honolulu. The return made by the Trustees was, "Grant No. 1248, corner of Miller and Vineyard streets, 3 8-10 acres, \$1920." The assessor increased this valuation to \$64,600 and the Tax Appeal Court after a hearing reduced it to \$25,000.

The contention is made in behalf of the College that the return was an error; that the return should have been for two acres only; that while it owns at that location 3 8-10 acres, 1 8-10 acres of this land is in actual use for school purposes and is exempt from taxation under Section 836, C. L., and that it is only liable to taxation for the two acres not used for school purposes; and that the valuation placed on this land by the Tax Appeal Court of \$25,000 is its full and true cash value.

The contention of the Assessor is that while the property owned by the College and actually used by it for school purposes is exempt from taxation, the claim for exemption in this instance cannot be allowed for the reason that the exemption was not claimed in the return and the the right to the exemption was waived by not making claim for it in the return.

The one question of difficulty presented by this appeal is whether or not the law requires the tax payer to return exempt property and to claim the exemption in the return in order to obtain the benefit of the exemption allowed by the statute. The solution of this question requires an interpretation of several sections of the tax statute. The law should be construed as a whole in order to determine the intention of the legislature—the real end sought in all interpretation of statutes.

Section 805, C. L., fixes the taxing period for the several kinds of property subject to taxation in this Territory and so far as it relates to the question at issue provides that, "All tax

payers shall make return of their property and the value thereof between the first and thirtieth days of January of each year." Standing alone this section would only require the return to show property subject to taxation—there would be no purpose for requiring it to show more.

Section 817 reads: "Except as herein provided, all real property and all personal property within the Territory shall be subject to an annual tax of one per cent. upon the full cash value of the same."

"Except as herein provided" takes out of the class of taxable property such real and personal property as is exempt from taxation by law.

Section 836, provides in part that "The following property shall be exempt from taxation: Real and personal property belonging * * * * * to incorporated or private schools and in the actual use of such schools."

Section 837, "Provided, however, that the tax of one per cent. herein imposed upon property shall be collected only upon property in excess of the value of three hundred dollars, be the same real or personal.

Such exemption shall be allowed in but one taxation district of the Territory, and that taxation district shall be the one in which the property owner resides.

And further provided, that no exemption shall be allowed from the property of corporations, companies, estates of deceased persons or non-residents.

And further provided, that a tenant, lessee or occupier of any real property that is exempt from taxation, shall not by reason thereof be exempt from taxation, but shall be assessed and shall be subject to taxation, in respect to the value of his interest in such property."

Section 870. "Each person liable to pay taxes and every owner or possessor of any property, real or personal, whether entitled to exemption or not, shall in the month of January of each year," etc., make return to the assessor.

Section 875. "Any person whose name may appear on such tax list, who shall have made his return to the assessor as

hereinbefore provided, and, if entitled to exemption, shall have claimed such exemption, and who may deem himself aggrieved," etc., may appeal to the Tax Appeal Court.

Considered alone Sections 870 and 875 tend to support the contention of the assessor but when taken in connection with the other provisions quoted it will be seen that in order to sustain the contention it will be necessary to read into section 836 a proviso not written in it by the legislature. This section exempts from taxation absolutely school property in actual use for school purposes and to hold such property subject to taxation under any circumstances it is necessary to read into the section a proviso something like this, "provided the property is returned and the exemption is claimed in the return." To do this would be an act of legislation pure and simple and is beyond the rightful power and duty of the court.

The exemption given by section 836 is of specific property and that in 837 is of property in the aggregate, of a designated value. The benefit of 837 is given to the person and is in the nature of a personal privilege. It is allowed to some persons and denied to others. Its benefits are given to individual taxpayers residing in the Territory and is denied to corporations, companies, the estates of deceased persons and non-residents. If the reference to "exemption" in Section 870, governing the return, and to claiming "exemption" in Section 875, governing appeals, relates only to the exemption given under Section 837, as we think was intended by the legislature, then there is harmony among all of the provisions and the law stands as written.

The very language of Section 875 condemns the construction contended for in the dissenting opinion. "If entitled to exemption, shall have claimed such exemption, and who may deem himself aggrieved by any charge made by the assessor in the valuation of the property as returned." This language cannot refer to specific property exempt from taxation. (1) because, if the property is exempt it is not valued in the return and if it is not valued how is it possible for the taxpayer to

deem himself aggrieved by any change in the valuation thereof made by the assessor? (2) "if entitled to exemption" cannot refer to items of exempt property. The phrase "entitled to" clearly conveys the idea of a privilege or right given to or connected with a person. This can only mean that if the taxpayer is within the class of persons entitled to claim the exemption given in Section 837 and claims the same it shall be allowed him. In this view of the question it is not necessary to add to or take from the words of the statute as written.

This construction would require the person entitled to the exemption allowed by Section 837 and whose property does not amount to over three hundred dollars in value to make the return and to claim the exemption as well as the one whose property does amount to more than that amount. The reason for requiring the return in the one case as well as in the other would be that the valuation of the property might be passed on by the assessor, the Tax Appeal Court and this Court if either the assessor or the taxpayer were dissatisfied with the valuation.

Where property is exempt it is not subject to taxation and there is no reason for requiring it to be returned and valued.

This interpretation has the support of the construction of the officers whose duty it has been to administer the law and usage under it, whatever weight such construction and usage may be entitled to. We understand that it has not been the practice to require the owners of the exempt property, under Section 836, to return the same; that no return has been required of the property belonging to the Territorial Government or the Queen's Hospital, or the Board of Education, or Churches and Colleges of property in actual use for religious or educational purposes.

We conclude that the 1 8-10 acres of the property in actual use for school purposes was under the law exempt from taxation and it was not necessary to return it or to claim the exemption in the return and that the taxpayer had a right to

show that the return was an error and to demand the exemption allowed by the statute.

As to the valuation of the two acres we are inclined to the opinion that the evidence does not show that the valuation of \$25,000 was less than the true cash value of the property and affirm the same. It is so ordered.

Robertson & Wilder for assessor.

Atkinson & Judd for taxpayer.

CONCURRING OPINION OF PERRY, J.

I concur. The real and the personal property which is required by the statute (C. L., Sect. 870, Subdivision 1) to be returned is that only which is *subject to taxation*. This is not a conclusion reached by mere inference from other language of the statute or by construction. The section in express words declares that the return required to be filed shall set forth the description, situation and value of the real and the personal property "*subject to taxation*" belonging to such person,—not of any other property. It is not a correct résumé of the section to say that it requires every owner or possessor of any property, real or personal, whether entitled to exemption or not to make *a return*, for the section contains another provision, an equally important one, to wit, that descriptive of the property directed to be returned. Similarly, the animals (Subdivision 3) and the employees (Subdivision 4) required to be returned are those only which are "*subject to taxation*." "Whether entitled to exemption or not," refers to the person or owner and not to the property; it refers to the privilege or exemption which is given to the owner and not to the class in which property is placed, as to taxability. Thus read, but not otherwise, the section is consistent with itself and with the other portions of the act. So, too, in Section 875, "if entitled to exemption," refers to the person.

Not all real or personal property within the definitions given by Sections 818 and 819 is made taxable by Section 817. By

virtue of the express exception in the latter Section, "except as herein provided," so much only of property of those classes is taxable as is not by other provisions of the act declared to be non-taxable.

There are several exemptions or privileges which were extended by the Act to certain persons or classes of persons and not to others, as, for example: (1) the better known \$300 exemption which is enjoyed, not by all owners alike, but by some only (Sect. 837); (2) that, as to personal taxes, in favor of infirm and indigent persons, to be granted by the assessors at their discretion (Section 835); (3) that, as to personal taxes, in favor of clergymen, members of the Hilo Fire Department and officers and soldiers of the National Guard and sharpshooters (Section 834).

If the sections under consideration are so construed, they are all given effect and are consistent with each other. The mandate of Section 836 is carried out and the property declared to be non-taxable is left free from taxation in all cases and not in some only; that of Section 870 is complied with and returns are required to be filed *of all property subject to taxation* and that, too, whether the *person* or *owner* (not the property) is entitled to exemption or not; and that of Section 875 likewise is obeyed and no person may appeal to the Tax Appeal Court on the question of whether or not he as distinguished from other persons (not the property) is entitled to an exemption unless he has claimed such exemption before the assessor. The time when such last mentioned claim, so far as poll, road and school taxes are concerned, is required by the statute to be made, may be a matter involved in some doubt, but the point need not be now decided. Certainly Section 877, which prescribes the form of certificates of appeal, shows beyond doubt that the legislature intended that disallowed claims for exemption from personal taxes, like other enumerated classes of questions, should be the subject of appeal.

The property described in 836 was, it seems to me, intended by the legislature to be free from taxation and that irrespective

of whether it was returned or not. I cannot believe that it was intended to authorize the assessor to assess and tax such property in cases where it is not returned or where it is not claimed in the return to be non-taxable. Even in the cases of the "property of parties or persons unknown and of non-residents for whom no return is made" it is the *taxable* property only which assessors are authorized to assess, Section 825.

If it be claimed that Section 805 requires taxpayers to return *all* their property, the obvious answer is that that section does not purport to set forth *what* property shall be returned, but merely to provide that all returns shall be made *between the first and thirtieth days of January of each year*, the emphasis being on the date and not on the nature of the return. The title "Assessment and Other Dates," as well as the other provisions of the section, make this clear. The section is what it purports in the title to be, a statement of the dates when assessments and other acts are required by the statute to be done, and nothing else.

The statement of the area of the land returned in the case at bar was manifestly an error. The value given, \$1920, cannot be reasonably supposed to have been intended as the value of the whole 3.8 acres, situate so near the center of the city. Further the land is described as being situate on the corner of *Miller* and *Vineyard*, not *Beretania*,—the latter is by far the more central and important thoroughfare and would ordinarily have been referred to had it been intended to describe the whole lot. Again, the return of leases of property at "corner of *Miller* and *Vineyard* Streets," shows a total annual rental of \$240, just one-eighth of the value returned. I think that the intention was to return only the small parcel which is subject to the leases and situate on the corner named, that that intention sufficiently appears from the return as a whole and that the return should be so construed.

Upon the only evidence adduced on the subject of the use to which the property had been put, that is to say, the testimony of the principal of the Punahou Preparatory School, I doubt

very much whether the Tax Appeal Court was justified in finding that a portion, two acres in extent, had not been in the actual use of the school, but since the college has not appealed that finding cannot be disturbed nor the valuation fixed by that court reduced.

DISSENTING OPINION OF FREAR, C.J.

The question is whether in order to entitle itself to take advantage of the exemption on appeal the appellant should have claimed it in its return.

It is true that Sections 817, 836 and 837, which relate to taxable property and exemptions, as well as most of the other sections of the statute, do not require this, for they have nothing to do with returns or claims of exemption or appeals.

But Section 870 expressly provides that, "Each person liable to pay taxes and every owner or possessor of any property, real or personal, *whether entitled to exemption or not*" shall make a return, and Section 875 expressly provides that, "Any person whose name may appear on such tax list, who shall have made his return to the assessor as hereinbefore provided, and, *if entitled to exemption, shall have claimed such exemption,*" and "whose *claim for exemption* shall not have been allowed, may appeal from such assessment," &c. Of these two sections, 870, which relates to returns, is, it is true, when read alone, somewhat ambiguous, because in specifying what shall be included in the return it speaks of property "subject to taxation." But the appellant did in fact return the whole property in dispute. The question is whether it should also have claimed the exemption as required by the other of those sections (875), which is the one now involved. There would seem to be little, if any, uncertainty about this. The language is clear. An appeal is allowed only on certain conditions, one of which is, if the appeal is on a question of exemption, that the appellant, "if entitled to exemption, shall have claimed such exemption," and no appeal can be entertained unless allowed by the statute, as this Court has held time and again.

The majority of the court come to an opposite conclusion but, in part at least, on different lines of reasoning. One of the majority thinks that the view that the exemption must be claimed, requires reading provisos into Sections 817 and 836. But that is not so any more than the contrary view requires not only reading some provisos into but some express provisions out of Section 875. It is unnecessary to do either. All that is necessary is to construe these sections together. As so construed, they mean, as it seems to me, that a party is entitled to exemption in certain cases but that if he wishes to take advantage of his special privilege he must claim it in his return. This member of the majority seems to make the exemptions mentioned in 875 relate only to those mentioned in 837 and not to those mentioned in 836. No such distinction is made in the statute. The privilege is special under 836 as well as under 837. Under each, the exemption is of property and not of persons. Under each, the exemption applies in certain cases and not in others. I believe also the exemption under Section 837 has in practice been allowed though not claimed. There is as much reason, perhaps more reason, both in policy and so far as the language of Sections 836 and 837 is concerned, for requiring a return and claim of exemption of property covered by Section 836 as of property covered by Section 837. Property belonging to the Territory or the Board of Education would not be taxable anyway, whether expressly declared to be exempt or not. The argument that the language of 875 condemns the construction now contended for, is answered by a reading of the whole section instead of only the part quoted in the prevailing opinion. To say that 875 applies to 837 and not 836 would seem to require a somewhat arbitrary construction.

The other member of the majority makes the exemption mentioned in Section 875 relate to personal exemptions as distinguished from property exemptions, and includes the exemption mentioned in Section 837 among the personal exemptions although it is expressed to be an exemption from the ordinary "tax of one per cent. herein imposed upon *property*" and is

only a proviso of the preceding Section (836), which relates to property taxes, and contains in itself a proviso relating to what is unquestionably a property tax. There does not seem to me to be any sufficient reason to make Section 875, which is general in its terms, relate to exemptions of personal taxes and not to exemptions of property taxes. Perhaps the reason most relied on for making such a distinction is that Section 870 in enumerating what shall be set out in the return does not require exempt property to be set out. But it just as clearly does not require anything to be set out in regard to the personal taxes of the party making the return. As a matter of practice no return for purposes of personal taxes is required or made, except that an employer is required in his return to set forth the names and nationalities of his employees who are subject to taxation. But that is merely for the convenience of the collector. The employer is not liable for the taxes of his employees nor can he in his own right claim an exemption or appeal for them. Indeed there is much in the statute to indicate that returns were intended to have nothing to do with personal taxes. For instance, such taxes have to be paid before March 31 and yet the assessment books, which are based on the returns, are not open to inspection until July 1, and the time for appealing is stated to be from July 1 to July 20.

The view that claims for exemptions have to be made, would not permit the assessment of non-taxable property of unknown or non-resident owners (under Sec. 825) any more than it would permit the assessment of non-taxable property of known or resident owners in the absence of a return or appeal. There is a difference between property that cannot be taxed under any circumstances and property that is ordinarily taxable under the law but which for some special reason is exempt in a particular case. In the one case the property is not subject to taxation at all; in the other case, it may be taxed unless the party entitled to the exemption claims his special privilege and shows that he comes within the exception to the general rule. I presume

that in any case the assessor would not assess exempt property if he knew that it was exempt, whether returned or not.

The statute is uncertain and inconsistent in a great many respects and while this may justify construing it more liberally than might otherwise be proper, at the same time it makes it more uncertain as to just what the legislature really intended. Here in Section 875 there is a clear express provision and one that seems to be reasonable and in harmony with the reasoning of past decisions, and I do not see my way clear to construe it away.

IN RE ASSESSMENT OF TAXES, C. BREWER & CO.,
LIMITED.

APPEAL FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED MARCH 25, 1903.

DECIDED JUNE 1, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

"Enterprise", as used in the third paragraph of Section 820, C. L., means "the combined property which forms the basis of an enterprise". *Inter-Island Steam Navigation Co. v. Shaw*, 10 Haw. 624, followed.

Under the term "combined property" as used in that section no property is made taxable which is not included within the definitions of the terms "real property" and "personal property" set forth in Sections 818 and 819.

The stocks and bonds of private corporations are not taxable under existing laws in this Territory.

Sugar plantation agency contracts are "contracts" within the meaning of that word as used in Section 819, and taxable; but neither promissory notes nor accounts receivable are such "contracts", nor are they taxable.

Where by reason of the skill, experience and integrity of the officers and servants of a corporation, its good will and the unity of ownership and the unity of use of its various items of property, the value of the tangible property of such corporation is increased, such increase of value is nevertheless the value of such tangible property and the latter is taxable under our statute at such increased value.

When the combined property forming the basis of an enterprise for profit consists in part of taxable and in part of non-taxable property and by reason of unity of ownership and unity of use and other intangible elements the aggregate value of all of such combined property is increased, such increment of value in so far as it is due to the non-taxable property is not taxable; and when the increment of value of the taxable property is due wholly to its unity of ownership and use with the non-taxable and not to the unity of ownership and use of its own parts,—when, in other words, the taxable property, considered independently of the non-taxable, is of no greater value when combined in use as an enterprise for profit than the total of its separate parts—such increment is not taxable.

In ascertaining the aggregate value of all the property owned by a corporation the amount of the debts, if any, of the corporation should be added to the selling price of the shares of its capital stock.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

The appellant returned for taxation for the year 1902 its leasehold interest in certain parcels of land, and the buildings thereon, at \$36,902.98, merchandise, cash in hand and other personal property at \$45,302.18 and gross insurance premiums received during the year 1902 at \$24,832.99, and the total of these separate items, \$107,038.15, as the “aggregate value of the combined real and personal property which is the basis of the business enterprise known as C. Brewer & Co., Limited.” The assessor, on the other hand, assessed the combined property, under Section 820, C. L., at \$1,121,137, reaching that figure by the following method:

10,000 shares (capital of the concern) at \$412.50	
(market price at sales of a few shares)	\$4,125,000.00
Less assessed value of Hawaiian Stocks and	
Bonds owned by the Company	2,851,700.00
	<hr/>
	\$1,273,300.00
Less 10%, probable reduction in	
sales of large blocks	\$127,330.00
and insurance premiums	23,833.00
	<hr/>
	152,163.00
	<hr/>
	\$1,121,137.00

The Court of Tax Appeals held that the assessment was correctly made under Section 820 and approved the method pursued by the assessor in ascertaining the aggregate value, deducting, however, 15 % in place of 10 %, from the market value of a few shares to ascertain the market value of the whole and computing such percentage on the total before deducting the value of the exempt property and not after, as was erroneously done by the assessor. The total valuation fixed by that court was \$629,717.00, i.e.:

10,000 shares at \$412.50	\$4,125,000.00
Less 15 %	\$ 618,750.00
Less Hawaiian stocks and bonds	2,851,700.00
and insurance premiums	24,833.00
	<hr/>
	3,495,283.00
	<hr/>
	\$ 629,717.00

Section 820 of the Civil Laws, under which the assessment was made and sustained, reads as follows: "All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value.

"Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels of real or per-

sonal property respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

“In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

“In ascertaining the aggregate value of the property constituting an enterprise for profit for the purpose indicated by this Section there shall be excluded therefrom the value of shares, in other Hawaiian Corporations, held or owned by such enterprise, and all property on which specific taxes are levied.

“And further provided, that when any real estate or house is leased or rented, the sum of eight years' rental thereof shall be the assessment value of such real estate or house, unless such valuation shall be manifestly unfair or unjust.” For the appellant it is contended that that section does not authorize the taxation of any property not included within the definition of the term “real property” or of “personal property” as set forth in Sections 818 and 819, that the Tax Court therefore erred in including in the total valuation the value of certain classes of property or elements not within those definitions, to wit, stocks and bonds in private corporations, bills and accounts receivable, good will, business experience and ability and integrity. For the assessor, on the other hand, the contention is that the aggregate value referred to in Section 820, is of *all* the property of the enterprise of whatever kind and whether defined in the two preceding sections or not. Sections 818 and 819 read: “The term ‘Real Property’ for the purposes of this Act, shall mean and include all lands, and town lots and house lots with the buildings, structures, fences, wharves, improvements and other things erected on or affixed to the same.

“The term ‘Personal Property’ for the purposes of this Act, shall mean and include all household furniture and effects, Jewelry, watches, goods, chattels, wares and merchandise, machinery, Hawaiian ships or vessels, whether at home or abroad, all moneys in hand, leasehold and chattel interest in land and real property, franchises, patents, contracts, growing crops, public stocks and bonds not exempted by law from taxation, and all animals not herein specifically taxed.”

The decision in the case of the *I. I. S. Navigation Co.*, 10 Haw. 624, has much that is applicable in the case at bar. In that case, as in this, the taxpayer contended that “the new law like the old, in so far as it bears upon the present case, provides for a tax upon property only; that a business or enterprise is to be distinguished from the property which forms its basis, in that the value of the former may depend a great many things besides the property, as, for example, upon labor, skill, experience, rapid turning of capital, want of competition and especially good will; that all these elements combine to produce the earnings and determine the market value of the stock, as well as the value of the enterprise; * * * that the assessor by considering chiefly, almost entirely, the earnings and the market value of the stock, proceeded on a wrong principle and really estimated the value of the enterprise, and erroneously took this as the value of the property, as if there were no distinction between the two.” The court said, at page 630, “It is true, these considerations” (the earnings, the market value of the stock and others) “are referred to in Section 17” (C. L., Section 820) “(third paragraph) only in connection with the value of the ‘enterprise,’ but we have no hesitation in holding that ‘enterprise’ as here used was intended to mean ‘the property forming the basis of an enterprise’ as in the preceding paragraph, or ‘the property constituting an enterprise’ as in the succeeding paragraph; this is also obvious from the language of Sec. 68 which requires the person making the return to set forth the aggregate value of the combined property of the enterprise, after taking these and other things into consideration. This is holding, not that the words ‘combined property’ in other

parts of these sections were intended to mean 'enterprise,' but that 'enterprise' in the third paragraph of Sec. 17 was intended to mean 'combined property of an enterprise.' " It being thus settled, then, that the "enterprise" means the "combined property which forms its basis" and not something different, it remains to be considered what is included within the term "combined property" or the term "the property forming the basis" of the enterprise.

The second paragraph of Section 820 shows clearly what the combined property referred to is. The language used is, "Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels of real or personal property respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed," etc. The "combined property" naturally and obviously means the real and the personal property or the several classes or kinds or parcels of real and personal property. Any other construction would be forced. What is real and what is personal property is set forth in Sections 818 and 819. "The term 'Real Property' *for the purposes of this Act* shall mean and include * * * The term 'Personal Property' *for the purposes of this Act* shall mean and include" * * * . This express declaration of the meaning of those terms must govern unless, indeed, there is sufficient elsewhere in the Act to show that the words are used in another sense. It is argued that in the fourth paragraph of Section 820 the provision requiring the exclusion from the aggregate value of "the value of shares, in other Hawaiian Corporations, held or owned by such enterprise," shows by implication that under that section it was intended to tax property not included in the definitions set forth in the preceding sections, because Hawaiian stocks are not in the list there contained and therefore it would be unnecessary to expressly direct their exclusion. The argument, while not wholly without force, seems to us insufficient to warrant a disregard of the express definition given "for the purposes of this Act." The provision

may be accounted for on the theory that it was inserted through abundant caution. The intention claimed, if it existed, was not sufficiently expressed. So far as this particular matter of inclusion of corporation stocks is concerned, not only does Section 819 make taxable only *public* stocks and bonds (that the stocks and bonds owned by the appellant are not *public* stocks or bonds, see *O. R. and L. Co. v. Brown*, 8 Haw. 163), but Section 830 expressly provides that "the individual stockholders or members" of a corporation "shall not be liable to be assessed in respect of their individual shares or interest in such companies." This also disposes of the contention made for the assessor that the value of stocks and bonds of corporations other than Hawaiian owned by C. Brewer & Co. should not be deducted from the total value of all the property constituting the enterprise.

The capital stock of C. Brewer & Co. is divided into 10,000 shares of the par value of \$100 per share. The market value of the shares, in small lots, is agreed to have been, on January 1, 1902, \$412.50. Just what the selling price of large blocks or of the whole stock would have been at that time, is, of course, difficult to determine; but no reason is apparent for holding that the Tax Court erred in fixing upon 15% as the rate of deduction. As so ascertained, the market value of the 10,000 shares was \$3,506,250. The total of bills payable and books debts owing by the corporation was \$475,125.43. The market value of the shares represents the value of the property of the corporation *subject to its debts* whether secured by note or otherwise. Adding, then, the amount of the indebtedness to the selling price of the shares, the aggregate value of all of the property of the corporation, of whatsoever nature, is found to be \$3,981,375.43. The assessed value of the stocks and bonds of private corporations, Hawaiian and others, and of certain land, situate on Maui, owned by the appellant and used in the "enterprise" but not taxable to the appellant in this Territory, or, as to the land, on this Island is \$3,214,802, of the taxable leaseholds and other taxable property as returned, \$82,205.16,

and the amount of bills and accounts receivable is \$562,655.31, or a total of \$3,859,662.47. Subtracting this latter amount from \$3,981,375.43, there is found a difference of \$121,712.96 which includes the value, if any, of certain agency contracts held by the concern with various sugar plantation companies and the increase of value due to the unity of use of the property of the company, to its good will and the business ability, experience and integrity of its officials and other servants. Whether the agency contracts, the bills and accounts receivable and the increase of the value due to unity of use, etc., or any of these, are taxable to the appellants, are questions involved.

As to the agency contracts. It appears from the evidence that the company entered into an agreement, in writing, with the Onomea Sugar Company, whereby it undertook to make certain advances of money to be used in carrying on the business of sugar planting and manufacture, to make purchases and sales for the principal and otherwise to act as agent, its compensation being a percentage of the proceeds of the sugar sold. This agreement was for a definite period of time of which seven years remained unexpired at the date of the hearing below. The company also holds a similar agreement with the Ookala Sugar Company (one year of the term unexpired at the date of the trial) and four others, with other corporations, which are verbal and not for any specified period of time. These agreements, whether written or verbal and whether for a definite period or terminable at will, are certainly all "contracts" within the meaning of Section 819. Whether or not they have any substantial value is another question. Those terminable at will, as also that with the Ookala Sugar Company for a term of one year only, have of themselves no cash value,—nothing could be realized upon an attempted sale of a privilege to act as agent which privilege carried with it no assurance of its continuance for a definite length of time. The "full cash value" under the tax law means the value for purposes of sale, if the property is salable, and not the value to the owner. *In re Assessment of Taxes, James B. Castle, ante*, p. 1. If a con-

tract is by its terms non-assignable, the test would be what it would be worth if it were assignable. *Ib.*; also *Knudsen v. Stoltz*, 8 Haw. 81. If the contracts under consideration have any value by reason of the ownership by the same company of large portions of the capital stock of the corporation with which the contracts are made, then such value is not taxable to the company because growing out of and due to the ownership of property which, as above seen, cannot be taxed to the company. As to the contract with the Onomea Sugar Company, the plaintiff's witnesses claimed in their testimony that it was of no cash value, the assessor has placed no valuation upon it, and the evidence on the subject is meagre, indefinite and unsatisfactory. The contract introduced in evidence in the *Castle & Cooke* case, argued on appeal together with this case by consent, is not in evidence in this case, but even assuming that it is, still the evidence does not show what portion of the income of C. Brewer & Co. was derived from this particular contract, and it would be neither safe nor correct practice to find or declare the income-producing capacity of the contract by mere conjecture or assumption. Further, that income-producing capacity, if found, could not be considered alone, either by an intending purchaser or by the Court, in determining the value so considered. The length of the unexpired term, the amount of sugar produced in the past by the plantation and the probability and the uncertainty as to the amount to be produced hereafter, the cost of production, past and future, and the amount of the advances requisite therefor, the obligation to make those advances when needed and to procure the money for that purpose, the continued credit of the agents at home and abroad, are all elements that would likewise have to be considered. The evidence adduced is utterly insufficient to enable us to make findings on these and other essential questions of fact. It is impossible, on the record as it stands, to find with definiteness what the value, if any, is. We think that justice will be more nearly accomplished by regarding the contract, for the purposes of this case, as of no value.

Promissory notes and accounts receivable. While promissory notes are, technically speaking, contracts, in our opinion they cannot be held to be such within the meaning of that term as used in Section 819. Revenue laws are to be construed strictly. *Castle & Cooke v. Luce*, 5 Haw. 321. "A strict construction in such cases is reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised." Cooley, Taxation, 200. "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found the construction must be in favor of the public; because it is a general rule that when the public are to be charged with a burden the intention of the Legislature to impose the burden must be explicitly and distinctly shown."—Potter's Dwarrris, Statutes, 255. "In passing tax bills legislatures are presumed to be careful to include in the schedules all the items upon which they intend a tax to be levied, and to express themselves so clearly that there can be no reasonable doubt as to the articles to be taxed. Statutes imposing taxes ought not to be construed so as to include articles or (in this case) instruments not clearly coming within them. For instance, a statute levying a tax on horses would not include mules, and one levying a tax on mules would not include asses. In construing a statute, the same rule of construction which is applicable in construing all documents or instruments between private parties has force. A person who makes an instrument and profers it to another makes it what he chooses and must cause it to express distinctly all that he means it to do."—*The Minister of Finance v. Bishop & Co.*, 3 Haw. 793, 794, 795. Promissory notes stand in a class by themselves and, as was said of checks in *Minister of Finance v. Bishop & Co.*, *supra.*, are of such use that if the legislature had intended to include them it would have mentioned them by their own name. In common language,

no one, speaking of "contracts," would be understood as meaning or including promissory notes. In the case just cited one of the questions was whether, under the Act of 1876 relating to stamp duties, a promissory note was liable to such duty under the title of "agreements." The Court held that it was not, saying: "The words of any statute are to be taken in their ordinary and usual signification, and although a promissory note is an agreement to pay money, yet, no one in reading this statute would consider the word 'agreement' as used therein to have such signification as would include either of the instruments which are the subjects of our consideration." That authority is clearly applicable to the case at bar. There is no distinction, material in this connection, between "agreements" and "contracts." So, too, in *Van Valkenberg v. Territory*, 14 Haw. 182, upon similar reasoning, a proxy, though conceded to be, technically speaking, a power of attorney, was held not be such within the meaning of the present Stamp Act, Section 918, C. L. It may be added that the fact that certain bonds are specifically named in Section 819 as taxable tends to support, to some extent, the views just set forth, as does also the further fact that the title, "notes of hand," specifically included in the law of 1876, does not appear in any of the later tax laws.

Accounts receivable, like promissory notes, are not, in common language, spoken of as contracts although technically they are contracts whether express or implied. Upon reasoning similar to that in the case of promissory notes, they must be held not to be "contracts" within the meaning of the statute.

Neither under the law of 1886, which also made "contracts" taxable, nor under the present statute, enacted in 1896, have promissory notes or accounts receivable been returned or assessed for taxation. The fact that the legislature, which may be presumed to have been aware of the construction thus placed upon the law by the executive officials of the government and by the public generally, has taken no steps to amend the law

in this respect, is not without weight. It tends to show the intention and understanding of the legislature in the matter.

The question concerning the other elements, unity of use, good will, etc., which tend to increase the total of the value of the separate parts, has been already decided in the *Inter-Island Steam Navigation Co. case*. "The questions of greatest difficulty," said the court in that case, "are whether the 'aggregate value of the combined property, of an enterprise, though consisting chiefly of personal property capable of indefinite multiplication, may materially exceed the sum of the values of the parts taken separately and if so, how far the earnings or the market value of the stock may be considered in determining such value. In the first place, the word 'aggregate' as here used in the expression 'aggregate value' does not mean merely 'sum' or 'total.' That is not necessarily its only meaning in common usage, and in this statute the words 'as a whole' used in the same clause show that the word 'aggregate' was intended to qualify the word 'value' so as to make it mean the value of the property as a unit and not merely as a collection of separate items. This is obvious also from other portions of these sections of the statute. In the second place, it is evident that the legislature regarded the value of the property as a whole as materially greater than the sum of the values of the parts considered separately. In the third place, it is evident that the legislature thought that the earnings and, in the case of a corporation, the market value of the stock, of an enterprise, were important considerations in determining the value of the property as a whole. These views of the legislature should be given effect, if possible, and, in our opinion, they are well founded in reason and amply supported by authority." The court then proceeded to discuss the three classes of statutes which have been enacted in the United States in recent years, "as a result of a belief that the properties of large enterprises, especially corporations, possess a considerable value from the very fact of their magnitude or the relations of their different parts to each other, and that such increment of value escapes

taxation under the ordinary statutes,” and for the purposes of subjecting to taxation that increment and the various factors, sometimes called intangible property, which go to make it up. “A third form of statute is one which, like our present statute, directs that the combined property shall be assessed as a whole. This is regarded as practically equivalent to the second form above mentioned” (one imposing tax upon both the tangible and the intangible property) “on the ground that the words ‘as a whole,’ or their equivalent, are intended to mean that the property is to be regarded with reference to the connection of its different parts, its earning capacity, and the uses to which it is put, in other words, not as passive, but as active, property,—the property of a going concern. The difference between this and the second form above mentioned is that this regards the tangible property as increased in value by the intangible factors, while that regards the intangible factors as property in themselves, though closely, or inseparably, connected with the tangible property.” The view of the Supreme Court of Ohio, declared in *St. v. Jones*, 51 O. St. 492, that in estimating the value of the tangible property as a whole, it was to be considered as affected by the intangible factors, though these were not taxable themselves, was referred to with approval and practically adopted, as was also the following language quoted from the opinion: “It is contended that when the value of the shares of the capital stock of a corporation is augmented through the franchise, good will and successful management of the business of the concern, such value should not avail to add to the true value in money of the tangible property of the corporation for the purpose of taxation. * * * But the property of a corporation may be regarded in the aggregate, as a unit, an entirety, as a plant designed for a specific object; and its value may be estimated not in parts, but taken as a whole. If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property.

Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. * * * If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property, or any other legitimate agency." It was upon this theory of the law that the assessment then under review was sustained.

We now quote further from *St. v. Jones, supra*: "It will, we think, be conceded that the earning capacity of real estate owned by individuals may be considered in fixing its value for taxation. Take an office building on a prominent street in one of our large cities. It will not be doubted, that by care in the selection of tenants, and in the preservation of the reputation of the building, by superior elevator service, by vigilance in guarding and protecting the property, by the exercise of skill and knowledge in the general management of the premises, a good will of the establishment will be promoted, which will tend to an extra increase in the earning capacity and value of the building. For the purpose of taxation, it would be none the less the true value in money of the building, because contributed to by the operative causes that gave rise to the good will. We discover no satisfactory reason why the same rule should not apply to the valuation of corporate property—why the selling value of the capital stock, as affected by the good will of the business, should be excluded from the consideration

of the board of appraisers and assessors under the Nichols Law, charged with the valuation of corporate property in this state, especially as the capital stock when paid up, practically represents, at least, an equal value of the corporate property.”

In *Sanford v. Poe*, 69 Fed. 546, the U. S. Circuit Court of Appeals, in considering the validity of the same Ohio law with reference to the commerce clause of the Federal Constitution, held that “tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property. * * * It purports to provide for a tax upon property within the State of Ohio,” and on appeal the United States Supreme Court (165 U. S. 194, 226) said of this: “The line of reasoning thus pursued is in accordance with the decisions of this court already cited. Assuming the proportion of capital employed in each of several states through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce.”

In the *Inter-Island* case the court perhaps went no further than to hold that where good will, skill and experience contribute incidentally only to the value of the taxable property of the corporation, such increased value cannot be said not to be the value of such taxable property, and it may be that under the statute, correctly construed, the intangible elements just named in a case in which they do not contribute incidentally only to the value but constitute the main or a substantial and clearly distinguishable part of the property should be excluded in determining the aggregate taxable value of the enterprise.

Out of a total market value of the enterprise as a whole of \$3,961,375.43, \$562,655.31 is accounted for in bills and accounts receivable and \$3,297,007.16 in other specific property (including both taxable and non-taxable property), leaving only \$121,712.96 as the increase of value due to unity of ownership and use of *all* the property and to good will,

skill and experience. If this increase were credited proportionally to the taxable (separate value, \$82,205.16) and to the non-taxable property (separate value \$3,777,457.31), the taxable property would appear to have increased in value, by reason of all of these intangible elements and by reason also of the unity of use of its parts with the non-taxable property, \$2,592.26. But upon the evidence in this case can it be held that the taxable property, (other than the Onomea agency contract) which, regarded as a number of separate items, is returned at an undisputed total value of \$82,205.16, has any increased value due to its unity of ownership and to the use of its parts each with the others as distinguished from the unity of ownership and use of its parts with the non-taxable property? We think not. The taxable property consists merely of a leasehold and office building (separate value, \$22,480.98), a leasehold interest in certain other land and a warehouse thereon (separate value, \$14,422.00), certain merchandise (separate value, \$36,414.11) and cash on hand, \$3,262.82. Whether these items are considered separately or as combined property, their total and aggregate value for purposes of sale cannot on the evidence be found to be more than \$82,205.16. If the use of this property in conjunction with that which is non-taxable renders the taxable of greater value *to its owners*, such added value cannot be considered as the true value for purposes of taxation. The value at which property is to be assessed under the tax law is the value for purposes of sale and not the value to the owner. *J. B. Castle case, ante, p. 1.*

- The valuation of the taxable property is fixed at \$82,205.16, as returned. In addition to this the amount of gross insurance premiums received by the company is, of course, subject to the specific tax provided by the statute.

Robertson & Wilder for assessor.

W. A. Whiting and C. F. Clemons for taxpayer.

DISSENTING OPINION OF GALBRAITH, J.

I understand that one proposition in particular was settled by the decision of this Court in *Inter-Island Steam Navigation Co. v. Shaw*, 10 Haw. 624, namely, that real and personal property combined and used in an enterprise for profit can be properly valued as a whole or unit, for taxation purposes, under Section 820, C. L., and that when so valued the value of the combined property or unit may be much greater than the sum of the values of the several items forming the unit. In other words that the value of whole (the combined property) may be greater than the sum of the values of all of its parts.

From this proposition it follows as a necessary deduction that by whatever sum the value of the unit or whole enterprise exceeds the sum of the values of its several parts to that extent intangible property is valued for taxation under this statute and to that extent Section 820 provides for and creates a new and distinct class of property for taxation purposes, namely, intangible property, a class of property not included in real estate as defined in section 818, or personal property as defined in section 819. It can make no material difference so far as this proposition is concerned whether the increased value results from intangible elements in tangible property or from intangible property altogether.

As was said by the Supreme Court in the Express Companies case. "The burden of the contention of the Express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property with the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. Take the simplest

illustration: B, a solvent man, purchases from A certain property, and gives to A his promise to pay, say \$100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B, may or may not be of the value of \$100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B to pay to A \$100,000. That promise is a part of A's property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property, which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax list, and the only property placed thereon be the separate pieces of tangible property? * * * * * To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man." *Adams Express Company v. Ohio*, 166 U. S. 185, 218, 219 and 220.

This theory of valuation ought to be well established in this jurisdiction since in the *Inter-Island* case intangible property was valued at \$211,709.52, the difference between the return of the taxpayer of the aggregate values of the several items of property and the valuation of the whole approved by the Court,

making the value of the intangible property almost as great as that of the tangible valued separately.

The decision in this case is a conclusive answer to the contention of the taxpayer that no property can be valued or considered in estimating the value of the combined property as defined in the Section 820 except real and personal property as defined in the preceding sections. It will be remembered that Section 820 providing for valuing combined property and Section 871, providing for returning the same, were engrafted on the tax law by the revision of 1896. (See Session Laws, 1896, Act 51, Secs. 17 and 68) and that prior to that time no similar provisions were found in the tax laws of the islands while the definitions of real and personal property as given in sections 818 and 819. were carried forward from the tax laws of 1892 and 1882, with little change in the language except that the last definition of personal property is extended to include "contracts."

The phrase "for the purposes of this Act" in each of the sections defining property is found in the earlier tax laws, those that existed prior to 1896, and was brought forward with the definitions from those laws, such use of this phrase cannot properly be held to indicate an intention on the part of the legislature to restrict the use of the words real and personal property in section 820 within the definitions given prior to its enactment. Section 820 is the later expression of the legislative will on the question and ought to control. At any rate, this court has held as above indicated, that no such limitation was intended to be made.

Under my view of the question it is immaterial whether or not the investment in the stock and bonds of California Corporations amounting at par value to \$363,102.00 is personal property within the definition given in Section 819, although it seems to me that there can be no serious doubt as a matter of law that the word "chattels" used in the definition is broad enough to include stock and bond within the definition of personal property. Bouvier; 2 Kent. 340; *Terhume v. Height*,

35 N. J. L. 279. The situs of these foreign stocks and bonds for taxation purposes follows that of the owner and is in this Territory and should be taxed here. *Bacon v. Tax Commissioners*, 126 Mich. 22; *McKeen v. Northampton*, 49 Pa. St. 525; *Ferrington v. Tennessee*, 96 U. S. 679; *Bristol v. Washington Co.*, 177 U. S. 133.

Contracts are specifically enumerated in the definition of personal property in Section 819 and are proper subject of taxation at their true cash value the same as other kinds of personal property.

The capital stock of the taxpayer is \$1,000,000, its gross income for the year ending December 31, 1901, was \$461,044.38, expenses for the same period were \$31,629.50, and net income or profits for that period \$429,414.88.

It appears from the evidence that there were six plantation agency contracts held by the taxpayer and not returned for taxation. These it is admitted come within the definition of personal property and should be taxed the same as other personal property but it is found by the majority of the court that the evidence fails to show the value of these contracts and "that justice will be more nearly accomplished by regarding the contracts, for the purposes of this case, as of no value."

It may be admitted that the evidence does not offer as satisfactory data as might be desired for measuring the value of these contracts. But who is to blame for this? The facts were in the possession of the taxpayer. It was its duty to give them to the assessor or to the Tax Appeal Court. It did not do so. I submit that it is not in the interest of the "accomplishment" of "justice" to give to this taxpayer a premium for withholding information. In other words to hold that certain of its property, which we know is subject to taxation, exempt from taxation for the reason that the taxpayer failed to furnish exact evidence for fixing the value of the property, especially since there is evidence from which a valuation may be placed on this property.

It is shown by the evidence that the commissions realized by the taxpayer from these contracts for the year preceding, (1901) amounted to \$91,110.00. This fact standing alone refutes the claim that the contracts have no ascertainable value. Property from which an annual income of \$91,110.00 is realized has a taxable value that ought not to escape the payment of its *pro rata* part of the expenses of the government because its owner denies that it has taxable value and fails to furnish full information for measuring it.

It is a well-settled rule of law that income, or the source of income, or capacity to produce income, is almost universally made the basis upon which taxes are estimated. *Cooley Taxation*, 16. *Adams Express Company v. Ohio*, 165 U. S. 194; *Adams Express Company v. Kentucky*, 166 U. S. 171. Why should these agency contracts not be valued for taxation purposes by the amount of income or profit that the agents receive from them? It does not lessen their value that only a person of large means or a wealthy corporation could act as agent. Since the agent does not wish to part with the agency or to sell it, particularly so long as it is so profitable.

Applying the above rule to the scant fact relative to these contracts the court possibly would be justified in fixing a valuation on them for taxation purposes equal to the sum which, at interest, at the rate of 10% per annum would produce an amount equal to that realized from them annually by the taxpayer, or \$91,110.00, however, this would undoubtedly be a valuable guide in arriving at their true taxable value. To say that these contracts have no ascertainable value is to close one's eyes to the fact of the annual profit derived from them and that this is almost equal to ten per cent. on the par value of the taxpayer's entire capital stock. There is nothing in the record to warrant the inference that these contracts are of peculiar value to this taxpayer and that they would not be of equal value to any other person of ordinary business capacity. The fact that they are given as a favor by the plantation does not detract from their taxable value. The Tax Appeal Court fixed the value

of the taxpayer's taxable property at \$629,717. This amount placed at interest at 10% per annum would only amount to \$72,971.70 per year or almost \$30,000.00 less than the amount realized annually from these contracts.

Considering the fact that the taxpayer did not produce the evidence that would have made it possible to fix the real value of these contracts and that the valuation placed on its property by the Tax Appeal Court does not appear to exceed the possible taxable value of these contracts alone I am convinced that the ends of justice would be subserved by the affirmance of the judgment of the Tax Appeal Court. This I think ought to be done.

IN RE ASSESSMENT OF TAXES, CASTLE & COOKE,
LIMITED.

APPEAL FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED MARCH 25, 1903.

DECIDED JUNE 1, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Goods purchased without and not yet within the Territory at the date of assessment, are not taxable under the laws of this Territory.

The valuation of the taxable property of the appellant fixed in accordance with the principles declared in the case of *C. Brewer & Co.*, *ante*, p. 29.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

The appellant returned certain named items of property, regarded separately, at a total value of \$38,286.12 and gross insurance premiums received during the year, \$44,465.79, and all of these regarded as combined property forming the basis

of the enterprise for profit known as Castle & Cooke, Limited, at the aggregate value of \$82,591.91. The assessor, proceeding under Section 820, C. L., assessed the combined property at \$516,630, thus:

10,000 shares capital stock at		
\$260.00		\$2,600,000 00
Less	\$ 300,000 00	
Less Hawn. stocks, assessed valuation	1,724,179 10	
Less Insurance premiums	45,125 46	
Less Land in California	14,064 98	
	<hr/>	2,083,370 00
		<hr/>
		\$ 516,630 00

The Court of Tax Appeals fixed the valuation at \$426,631.00, thus:

10,000 shares at \$260		\$2,600,000 00
Less 15%	\$ 390,000 00	
Less Hawn. stocks, assessed valuation	1,724,179 00	
Less Insurance premiums	45,126 00	
Less Land in California	14,064 00	
	<hr/>	2,173,369 00
		<hr/>
		\$ 426,631 00

Of the questions of law raised in this case, all but one are considered and disposed of in the decision just rendered in the case of *C. Brewer & Co., ante*, p. 29, and that one is whether or not goods purchased without and not yet within the Territory are taxable to the appellant. We think that they are not. The tax prescribed by the statute, Section 817, is imposed only on property "within the Territory." It is contended, however, that the tax may in this case be imposed under the head of "contracts," that the appellant has "contracts for these goods to ar-

rive"; but the evidence adduced shows that the goods had been purchased and were already the property of the appellant. There was no contract. That the appellant might have sold the goods before arrival, does not of itself render them taxable.

The valuation of the taxable property is fixed at \$38,286.12, as returned. In addition to this the amount of gross insurance premiums received by the company is, of course, subject to the specific tax provided by the statute.

Mr. Justice Galbraith dissents.

Robertson & Wilder for assessor.

W. R. Castle for taxpayer.

SAMUEL C. ALLEN v. GEORGE W. LUCAS, ALBERT
H. LUCAS, a Minor, by his Guardian *ad litem*, J. J.
DUNNE, and THOMAS R. LUCAS, JR., LYDIA C.
LUCAS, JR., and NORMAN W. LUCAS, by their
Guardian *ad litem*, E. M. WATSON.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 30, 1903. DECIDED JUNE 3, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A mortgagee has sufficient title or interest after default by the mortgagor to enable him to bring a statutory action to quiet title against third parties.

A court of law cannot, in the absence of statute, allow fees, in the nature of counsel fees, to guardians *ad litem* to be paid by the opposite parties.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

This is a statutory action to quiet title. It is brought by a mortgagee after default of the mortgagors, against certain other persons, who, it is alleged, claim an estate or interest in the mortgaged land. On demurrer, the Circuit Court ordered the complaint dismissed and plaintiff to pay costs including a fee of \$75 to one of the guardians ad litem and of \$50 to the other, to which order the plaintiff excepted and now brings the case here by writ of error.

Two points are raised. The principal one is that a mortgagee has not such title or interest as to enable him to bring an action of this kind. The statute, which is set out in full in *Mossman v. Dole*, 14 Haw. 368, provides that actions of this nature may be brought "by any person." This is in terms about as broad as it can be. Doubtless as held elsewhere a mere stranger could not bring the action, notwithstanding the breadth of the language used. The complainant would have to be a party in interest. Whether an equitable interest alone would be sufficient we need not say. It seems to us that a mortgagee, after default, has a sufficient legal interest as against others than the mortgagor.

There are two leading theories of mortgages. One is the common law theory which regards the mortgage as what it purports to be—a deed defeasible upon the performance of a condition subsequent. The title passes to the mortgagee. He is entitled to possession, and may recover it in ejectment, in the absence of an agreement to the contrary, even before default by the mortgagor. After default his title becomes absolute at law, and the mortgagor cannot even redeem. But equity after some centuries stepped in and permitted the mortgagor to redeem. This interference by equity has been developed, chiefly by statute, into what is known as the equitable theory, now recognized at law as well as in equity in many jurisdictions, which regards the mortgage as what it is really intended to be

—a mere security for a debt. The title remains in the mortgagor and he is entitled to possession even after default, and until foreclosure, in the absence of an agreement to the contrary, the mortgagee having merely a lien. These two theories have many features in common notwithstanding these and other points of difference. The common law theory still holds for the most part in England and most of the eastern states, that is, the older states, while the new theory obtains in most of the western states—as a result to some extent of the adoption of codes taken largely from the code of New York where this theory originated. In some states these two systems are blended to a greater or less extent. For instance, in several the mortgagor is entitled to possession before default and the mortgagee after default. In several the mortgagee is regarded as having the legal title for some purposes and not for other purposes. The idea of the courts which blend the two theories seems to be that the mortgagee's title or interest should be held sufficiently extensive to protect his rights and sufficiently limited to protect the mortgagor's rights. See in general Jones, *Mtgs.*, Sec. 11 *et seq.*; 2 Wash., R. P., 6th Ed., Sec. 1041, *et seq.* No one theory is entirely consistent in all respects. This would naturally be so where the unusual course is adopted of allowing the actual intention to override the expressed intention.

“Just what the theory of mortgages is here has never, that we are aware of, been judicially determined.” *Malani v. Alapai*, 13 Haw. 194. *Hardy v. Ruggles*, 1 Haw. 457, is cited as tending to show the adoption of the equitable theory here, but the court merely held that within the meaning of the registry statute, construing that statute as a whole, the legislature intended to include mortgages under “pledges.” The word “pledges” was held to have been used there in its general as distinguished from its technical sense, and the court said: “We would not urge for a moment that there is not a clear and plain distinction between a pledge and a mortgage, in a technical sense of those terms.” *Campbell v. Kamaiopili*, 3 Haw. 477 (followed in *Kaikainahaole v. Allen*, 14 Haw. 527) is cited

to show that the common law theory has been recognized here. In that case the court held that a mortgagee could proceed by foreclosure after the debt was barred by the statute of limitations, in other words, in substance, that the mortgage was not a mere incident of the debt, saying, among other things, that "a mortgage deed of land conveys to the mortgagee his heirs and assigns, a vested right in the mortgaged land, defeasible only on performance of the condition named in the deed, unless affected by adverse occupancy. * * * * We do not think the act was intended to divest mortgagees of their titles or of their remedies against the land by foreclosure. In *Kanoii v. Kaioipahia*, 11 Haw. 389, the court said: "It will be unnecessary to go into the question of the theory of mortgages in this country with respect to the status or legal rights of the parties thereto," but recognized that the rights of those parties as against each other might be different from their rights as against third parties.

The equitable theory is mostly of statutory origin. There are no statutes here requiring its adoption. There are no Hawaiian judicial precedents requiring its adoption. On the contrary, the precedents, so far as they go, point the other way. There has been no usage here that has gone to the extent of showing that a mortgagee has not sufficient title after default of the mortgagor to enable him to protect himself against third parties. The courts in a number of states which have adopted the equitable theory permit the mortgagee to act as if he had the legal title for some purposes. It may be that the mortgagor here is entitled to possession as against both third parties and the mortgagee until default and even until foreclosure, and yet the mortgagee might consistently be held clothed with sufficient title after default of the mortgagor to protect himself against strangers under our broad statute on quieting title. It would certainly seem just to permit him to clear up the title preparatory to foreclosure, and we know of no reason in law to prevent this. In *Love v. Bryson*, 57 Ark. 589 (22 S. W. 341) the mortgagee was held to have sufficient "legal title" to "maintain ejectment or a suit to quiet title preparatory to a sale

under the mortgage." That would be expected, for in Arkansas the common law theory of mortgages prevails. In *Rosenbaum v. Foss*, 4 S. Dak. 184, in a state in which the lien or equitable theory prevails, it was held that a mortgagee could maintain an action to quiet title against one who claimed under a prior mortgage. But the statute there relating to actions to quiet title was worded somewhat differently from ours.

The second point raised relates to the fees ordered paid by the plaintiff to the guardians *ad litem* of certain of the defendants. The guardians contend first that this question cannot be raised now for several reasons. (1) Because the order was made after judgment. The record shows that there was but one order for the dismissal of the complaint and the payment of fees. (2) Because the order is not within the "record" as defined in Civ. L., Sec. 1446. That section provides that certain things shall be included in the record for the purposes of the writ of error statute, but does not exclude other things which are necessarily part of the record, such as the judgment or order itself. (3) Because the plaintiff did not move for a retaxation of costs. We do not see that such a motion was necessary. Besides the order was part of the main judgment and was not part of a proceeding for taxation of costs. (4) Because the plaintiff did not except to the portion of the order that related to fees. Whether an exception was necessary, the error appearing on the record, we need not say. See *Cummings v. Laukea*, 10 Haw. 1. A fair construction of the exception taken makes it cover the entire order, although the order is described in part in the exception as "sustaining the demurrer of the defendants to the complaint filed herein, and dismissing the said complaint." It may be added that the order for costs and fees being merely incidental to the principal order dismissing the complaint would fall with the latter.

As to the merits of the question of fees, a court of law has no authority in the absence of statute to allow fees of this kind, in the nature of counsel fees, against a losing party. Such fees may be allowed as necessary expenses in probate out of the

estates of the minors themselves, and in some jurisdictions, under statutes, by the court trying the action, but not by that court in the absence of statute and against the opposite party.

The writ is allowed, the judgment and order below reversed and the case remanded to the Circuit Court for further proceedings consistent with this opinion.

W. A. Whiting; Holmes & Stanley; C. F. Clemons, for plaintiff.

E. M. Watson; J. J. Dunne, for defendants.

DISSENTING OPINION OF GALBRAITH, J.

The language of this statute is not so broad as is claimed. The phrase "any person" used in Section 1773 to indicate who may be plaintiff in the action does not include any one who may cast covetous eyes at a tract of land and who may be able to hire a lawyer and to pay court costs and empower such a person to bring the action to quiet title. The only person who may be defendant is some one who "claims adversely to the plaintiff an estate or interest in real property" and the action may be brought "for the purpose of determining such adverse claim." The "any person" who may be plaintiff in the action must be some person who has an estate or interest in the land otherwise no one could claim "an estate or interest" adversely to him. The general rule both in law and equity requires that the plaintiff in the action to quiet title must hold the legal title.

"Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances, or instruments of record, the construction and effect of which will properly rest with the court." *Holland v. Chollen*, 110 U. S. 15, 25.

"Under that statute," (the statute of Nebraska authorizing actions to quiet title), "as under the general jurisdiction in equity, it is 'the title,' that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests." *Frost v. Spitley*, 121 U. S. 552, 557; see also—*Chapman v. Jones*, 149 Ind. 434; *Johnson v. McCheney*, 33

Ill. App. 526; *Henry v. Pesoli*, 109 Cal. 58; *Ely v. New Mex. Ect., Railroad Co.*, 129 U. S. 291, 292; *Whitehead v. Shut-tuck*, 138 *id.* 146, 156; *Dick v. Foraker*, 155, *id.* 404, 414; *Gillis v. Downey*, 85 Fed. 483, 485.

A good and sufficient reason in law why a mortgagee cannot, prior to foreclosure and sale, maintain the statutory action to quiet title is that he does not hold the legal title to the land.

It is not claimed that there is a statute in this Territory adopting either the common law or the equitable theory of mortgages and defining the title that a mortgage conveys to the mortgagee but it is asserted that there is no "usage" here prohibiting the mortgagee, after default, from protecting his rights against third parties and strangers. This may be admitted without assenting to the proposition that a mortgage conveys to the mortgagee the legal title to the mortgaged premises or that the mortgagee may maintain the statutory action to quiet title prior to foreclosure and sale.

While we have no statute governing this question there is not wanting here judicial development of the law along the lines contended for by the plaintiff; and, it seems to me, that it is only necessary to advance one more step in order to render a statute on the subject entirely superfluous. This step, as I understand it, is taken in the majority opinion, namely, holding in effect that a mortgage conveys to the mortgagee the legal title to the mortgaged premises.

It was declared in *Campbell v. Kamaiopili*, 3 Haw. 477, 478, that the mortgage conveyed to the mortgagee "vested interest in the mortgaged land" and this declaration was quoted with approval in *Kaikainahaole v. Allen*, 14 Haw. 527, 529. There is, however, a wide difference between "a vested interest in land" and the legal title to land. The law of this question ought not in my opinion to be developed further by judicial decisions. If a statute on the subject is desirable the legislature and not the court should make it.

The object of this statute to quiet title was not to try the plaintiff's title but to determine that of some one who was

claiming adversely to him. There is a well established procedure—one confirmed by long usage—that is ample to protect and enforce every right of a mortgagee after default. No satisfactory reason is shown why the plaintiff should not follow this settled procedure instead of experimenting with this statutory action before the title of the land is vested in him.

AH HING v. AH ON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 21, 1903.

DECIDED JUNE 4, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The right of trial by jury may be waived in civil cases by actions or conduct as well as by words and is held to have been waived by a defendant in default, if he had such right at all, by not claiming the right until after the hearing on the assessment of damages was nearly completed.

OPINION OF THE COURT BY FREAR, C.J.

This action for false imprisonment, in which judgment was rendered for the plaintiff in the sum of \$100, comes here on defendant's exceptions, upon only two of the points raised by which he now relies.

1. That his motion to open the default was disallowed. Aside from the question whether the trial Judge rightly denied this motion on the ground that another Judge had previously denied it, there do not appear to have been any merits in the motion.

2. That, though in default, he was entitled to a trial or hearing before a jury on the assessment of damages. Without

going into the question whether this point was raised in proper form or into the many questions argued as to the right of trial by jury in default cases, it is well settled that such right may be waived in civil cases, and that it may be waived by actions or conduct as well as expressly and in this case, if the right existed, it must be held to have been waived by the defendant's conduct and the plaintiff's express waiver, which was filed November 13, 1901. The defendant did not suggest a jury until well along on the second (the last) day of the hearing of the evidence on the assessment of damages, September 25, 1902. See *Kearney v. Case*, 12 Wall. 275; *Perego v. Dodge*, 163 U. S. 160; *U. S. v. Harris*, 106 U. S. 629; *Walcott v. O'Connor*, 163 Mass. 21; *Bonewitz v. Bonewitz*, 50 Oh. St. 373; *Sheets v. Bray*, 125 Ind. 33; *Baird v. Mayor*, 74 N. Y. 382; *Pfister v. Dascey*, 65 Cal. 403.

The exceptions are overruled.

Kinney, McClanahan & Bigelow for plaintiff.

Geo. A. Davis for defendant.

IN RE ASSESSMENT OF TAXES, LAM WO SING.

APPEAL FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED MARCH 26, 1903.

DECIDED JUNE 5, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A lessee's interest cannot be arbitrarily valued for purposes of taxation by fixing the value of the land without the lease and deducting therefrom eight times the annual rental supposed to be the value of the lessor's interest.

The value of a leasehold varies with the length of the term of the lease as well as with the income derived therefrom.

An assessment of unreturned property is held unappealable.

OPINION OF THE COURT BY FREAR, C.J.

The taxpayer returned his rice plantation at Waikiki as separate items: real property in fee, consisting of many small pieces, \$14,332; leasehold interests in many small pieces of land, nothing; rice, paddy, &c., \$13,152; growing crops, \$9,000; and live stock, \$630. The assessor raised nearly all the valuations to a greater or less extent. The fee simple property was raised about fifty per cent. The taxpayer acquiesced in all the increased amounts except that of the leasehold interests, which the assessor placed at \$19,621. As to that he appealed to the Tax Appeal Court, which reduced that valuation to \$9,000, from which he now appeals to this court.

Omitting the land held in fee and about thirty acres held at will, there remains about 120 acres held under thirty-one separate leases having from about one to thirteen years to run.

The assessor in nearly every instance adopted \$500 per acre as the value of the land without the lease, deducted the amount of eight times the rental as the value of the lessor's interest, and assessed the balance to the lessee, with, of course, absurd results. For instance, one lease of less than half an acre on which rent was paid at the rate of over \$40 per acre per annum and which had only ten months to run was valued at \$75. That a lessee's interest cannot be valued in this arbitrary way is evident. See *In re Hawaii Co., Ltd.*, 13 Haw. 699; *In re Bishop Est.*, 13 Haw. 671; *Chilton v. Shaw*, 13 Haw. 250; *O. R. & L. Co. v. Shaw*, 11 Haw. 210; *O. R. & L. Co. v. Shaw*, 10 Haw. 643; *Parker v. Shaw*, 10 Haw. 410. The assessor also considered the value of a lease about to expire as equal to that of one having a long term to run, because the lessee could make out of it during the year as much in the one case as in the other. This, of course, was erroneous. The tax was a property tax, not an income tax.

The Tax Appeal Court allowed nothing for about 50 acres, because the leases of those were to expire within a year and five months and so reduced the amount (for the remaining 70 acres).

proportionally to \$10,400 and then made a further reduction to \$9,000 because some of the remaining leases had only comparatively short terms to run.

The leases on about 54 of these 70 acres would expire in 2, 3, 4 and 6 years, and those on about 9 acres more in 7, 8 and 9 years, leaving those on only about 7 acres to run 13 years. The average rental paid on the 120 acres was \$27.33 per acre per annum. But the average paid on the 70 acres was \$36.50. This would seem to be about as much as the land was worth, leaving little, if any, value for the leasehold interests. And yet it appears that same or all of these lands are subleased, though it does not appear at what, if any, advance of rental. The 30 acres held at will average \$39.64 per acre per annum in rental, or about \$3 more than the 70 under leases having more than a year and a half to run. But it is contended that some of these higher rentals have to be paid in order to avoid trouble because the lands are scattered through the plantation. One leasehold of 5.3 acres with an artesian well must remain as assessed at \$1250, because it was not returned and there can be no appeal as to that. There is nothing to show that the assessor did not assess this piece according to the best information within his reach, as required by the statute. Certain other leases might reasonably have small valuations placed on them, even though they and others together might have little or no value as a whole. The bad ones cannot be used to off-set the good ones, when they are returned and assessed separately. If all the property making up the plantation had been returned as a whole, as it perhaps ought to have been, the case might be different.

Without going into details we think that such of the leasehold interests as have value, including the 5.3 acres unreturned, might properly be assessed at \$2,000, and it is so ordered.

OPINION OF PERRY, J.

I concur as to the unreturned piece of land, but as to the

appellant's leasehold interests in the other pieces my finding, upon the evidence, is that they have no salable or taxable value.

Robertson & Wilder for assessor.

Holmes & Stanley for taxpayer

TERRITORY OF HAWAII v. AKI.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED APRIL 20, 1903.

DECIDED JUNE 13, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A document purporting to be a notice of appeal from a District Magistrate to a Circuit Court which is not signed by the appellant or some one on his behalf, is not a notice of appeal within the meaning of the statute.

OPINION OF THE COURT BY PERRY, J.

The only exception in this case is to the dismissal by the Circuit Court of the defendant's appeal from the District Court of Puna, Hawaii, such dismissal being based on the ground that the instrument filed purporting to be the notice of appeal was not signed.

There was no error in the ruling excepted to. The statute (C. L., Sec. 1430) provides that appeals shall be allowed from all decisions of District Magistrates to the Circuit Court of the same Circuit whenever the party appealing "shall file notice of his appeal" within a time stated and comply with certain other conditions. The notice required by this statute must be *in writing*. *Kaleialii v. Grinbaum*, 9 Haw. 141. In our opinion, such writing in order to constitute a notice within the meaning of the statute must be signed by the appellant or by some one

in his behalf. Without signature it is not the act of the party and is as though no notice had been filed. See *Doer v. Life Association*, 92 Ia. 39; *Larrabee v. Morrisson*, 15 Minn. 151; 2 Encycl. Pl. & Pr. 215. That the failure to sign the notice was due to ignorance or to inadvertence or to the reliance placed by the defendant upon those who were requested by him to prepare the necessary papers, is not a sufficient excuse.

The exception is overruled.

Deputy Attorney General Peters for the Territory.

Messrs. Wise & Ross for the defendant.

TERRITORY OF HAWAII *v.* YOSHIKAWA DENGIRO.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED APRIL 22, 1903.

DECIDED JUNE 13, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The court in the charge to the jury gave a synopsis of the evidence offered by the prosecution without referring in any way to the evidence for the defendant. Held, that this was error for which a verdict of conviction should be set aside and a new trial ordered.

OPINION OF THE COURT BY GALBRAITH, J.

Yoshikawa Dengiro, a Japanese, was convicted of the murder of Yoshiaya Kosaku, a fellow countryman, on the 26th day of May, A. D. 1902, at Kapaa, Island of Kauai, Territory of Hawaii, and sentenced to be hung. Three exceptions taken to alleged errors of law during the course of the trial and embodied in a bill of exceptions, duly allowed, are urged as grounds for reversal of the judgment and for ordering a new trial.

It appears that the deceased and his wife were plantation laborers and lived in a one roomed hut or house, at Kapaa, Kauai; that the deceased was 47 years of age and his wife 39; that they had been married 21 years; that the defendant was 20 years old and was the adopted son of the deceased and his wife, Yoshikawa Ichi; that they had caused him to come to the islands from Japan, about three months prior to the homicide, and that he had lived in the hut with the deceased and wife.

The wife of the deceased was the principal witness for the prosecution. She testified in substance that she, the deceased, and the defendant had resided together in the house for about three months prior to May 26, 1902, that the defendant did not work but loafed around the house and the deceased told him on May 26, 1902, to go to Honolulu; that the defendant said he would go and left the house about 7 o'clock in the evening of that day; that the defendant remained away until about 11 o'clock that night when he came to the door of the hut and called out for his clothes; that the deceased arose from bed and picked up the clothes which were tied in a bundle and lying on the floor opened the door and passed the bundle out to the defendant; that immediately the door was opened the defendant without saying a word commenced to shoot at the deceased, firing three shots in rapid succession; that the deceased was shot in the neck but did not fall and started out of the house towards the defendant and followed him around to the rear of the house; that the lamp was burning brightly in the room but it was dark outside; that the witness being very much frightened at the shooting arose from bed and ran out of the house and hid under a grass hut near by and after she reached the hut she heard five more shots fired from the rear of the house in the direction where the deceased and defendant disappeared.

Sometime later that night the police found the dead body of the deceased in the rear of the house and there were eight or nine bullet wounds on it. About the same time the defendant was arrested near the house and a revolver and cartridges were found in the sleeve of his kimono. It was shown that the defendant purchased the revolver and cartridges at the neighbor-

ing store about five o'clock in the afternoon of May 26, 1902. It was shown that the wounds on the body of the deceased were made by balls from a revolver similar in calibre to that found on the defendant.

The defendant testified in his own behalf in substance as follows: that on the day of the tragedy and the day preceding his father had been drinking saki freely and had beaten his mother and when he interfered had struck the defendant and had threatened to kill him; that before he was told to go to Honolulu and before he left the house in the evening of the 26th of May his father was busy sharpening a knife (described as a vegetable knife with blade 4 inches in length) and was "acting crazy like;" that he bought the revolver to protect himself because he was going to Honolulu; that when he returned to the house at night for his clothes, he went to the door and called out and then sat down in a chair to wait for the clothes to be handed him; that when the deceased opened the door and saw the witness he threw the bundle of clothes at him and came towards him with the knife in his uplifted hand; that from his attitude and action and the previous threats the witness thought that the deceased intended to kill him and he shot three times at his legs and then ran away and did not see the deceased afterwards.

The first exception was to the ruling of the court admitting the revolver in evidence on the ground that the identification was incomplete. The error in this ruling, if any, was fully cured by subsequent testimony and the admission of the defendant.

The second exception was to one of the instructions of the court to the jury excepted to at the time and duly embodied in the bill of exceptions wherein the court said: "You have heard the evidence of the prosecution offered in proof of this charge. I give you a condensed synopsis of it, namely, that of the wife of Kosaku detailing the circumstances of the shooting; of Mau Kee, who testifies that the defendant bought of him at his store at Kapaa on the 26th of May at 5 P. M. a revolver, 32 caliber and 50 cartridges 32 caliber paying \$7.50 for the pistol and \$1 for cartridges. He testified that defendant was the only Jap-

anese to whom he had sold a revolver. Deputy Sheriff Haae testifies that he went to the house of Kosaku between 11 and 12 o'clock on the night of May 26. Took defendant in custody, found revolver and cartridges on his person in his sleeve. The revolver was loaded, saw Kosaku dead back of the house. There were eight wounds on his body, on face and neck and side. Next day went back and searched for empty shells found some in front of house and some behind it. The shells were of 32 caliber. The police officer Kumuaio testifies that he saw defendant purchasing a 32 caliber revolver at Mau Kee's store on May 26th, a small 6 chamber revolver 32 caliber. Sheriff Coney testifies that he came to Kosaku's house at Kapaa. Found his dead body with not less than eight bullet wounds in it. Went to the place where the body was said to be, found there this bullet No. 32 produced in evidence, back of house between gate and water-closet. Haae handed me the revolver and cartridges taken from defendant. They have been in my possession ever since. Seven empty shells were found, some near corner of house. Dr. Waughop testified that he examined the dead body of Kosaku, found nine bullet wounds. He identified one bullet produced in court as the one he took from a rib of Kosaku in which it was imbedded. Mr. Rice testified as to the caliber of the pistol the empty shell being number 32." This summary is confined entirely to the evidence of the prosecution. No reference is made to the testimony of the defendant nor were the jury reminded in this instruction or in any other part of the charge that they were, under the law, the "exclusive judges of the facts."

The statute defining the province of the jury in jury trials in this Territory reads as follows: "The jury shall in all cases be exclusive judges of the facts in suits tried before them, and the judge or justice presiding at any jury trial (hereinafter named the court), shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause. Provided, however, that nothing herein shall be construed to prohibit the

court from charging the jury whether there is or is not evidence, (indicating the evidence), tending to establishing or to rebut any specific fact involved in the cause, nor shall it be construed to prohibit the setting aside of a verdict rendered by such jury, in a proper case, as being against the weight of the evidence, and the granting of a new trial therein." Sec. 1355, C. L. This statute makes the jury the "exclusive judges of the facts" and does not require the court to make a summary or synopsis of the evidence for them. It is contended by the attorney general that the court had a right to make a fair summary of the evidence to the jury. This may be true but a summary that only considers the evidence of one side and totally ignores that of the other cannot be said to be a fair summary. This synopsis in the charge complained of was not fair to the defendant for the reason that it ignored his defense and his testimony in support of it altogether.

"We assume it to be the law, that, while it is not, in this state, the duty of the trial judge to sum up the evidence to the jury, yet it is not improper to do so providing it is fairly done, and all the material evidence on both sides is fairly presented. The judge should not single out isolated parts of the testimony, and instruct as to the law arising on the facts which such testimony tends to prove, nor give undue prominence to certain portions of it, and especially ought he not to review with synopsis only those facts which have a tendency to establish one side of the case. When one single fact is selected and strongly commented on, the tendency is to distort its importance in the estimation of the jury, and to concentrate attention too intently upon it, to the undervaluing of the rest of the evidence." *Morgan v. The State*, 48 O. St. 371, 377, 378; *Thompson on Charging the Jury*, p. 111; *Shank v. The State*, 25 Ind. 207, 209; *The State v. McNeill*, 93 N. C. 552, 557. *People v. Lyons*, 49 Mich. 78.

The judge's synopsis of the evidence for the Territory given without reminding the jury that under the law they were the exclusive judges of the facts may be said to have been an invasion of the province of the jury by the court or at least to have

given undue prominence to the evidence for the prosecution and to have overlooked the real issue in the case. The shooting was admitted by the defendant. The real issue in the case under the testimony was whether or not there was any justification for the killing. This issue seems to have been entirely ignored. There were but two eye-witnesses to the tragedy or any part of it—the mother and the defendant.

The one testified for the Territory and the other for the defense. Their evidence was conflicting to a degree. If the jury believed the testimony of the mother the defendant was guilty of the crime charged and if they believed his story he was not guilty. The defendant was on trial for his life. He had a right to demand that his evidence with that for the Territory should be submitted to the jury under proper instructions on the law without undue prominence being given to any part of it. This right was denied him and on this account we cannot say that the defendant had what every one accused of crime is entitled to, namely, *a fair trial*. For this reason the exception is sustained and the verdict of conviction is set aside and the cause is remanded to the Circuit Court of the Fifth Circuit with direction to grant a new trial.

S. K. Kaeo and Creighton & Correa for appellant.

L. Andrews, Attorney-General, and William S. Fleming for Territory.

CHEE KIT v. LEE LUNG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 25, 1903.

DECIDED JUNE 13, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A party may abate as a nuisance so much of a dam in a stream as is necessary to enable him to obtain the water to which he is entitled at a point below the dam.

In an action for assault and battery for resisting an effort to prevent such abatement, it is error to exclude evidence that the dam is a nuisance (on the theory that, assuming it to be a nuisance, the defendant could not lawfully continue in his attempt at abatement after the plaintiff interfered—because of the danger of a breach of the peace) and then to instruct the jury that the defendant had shown no right to justify his attempt to cut down any part of the dam, and that the plaintiff was justified in resisting such breaking or cutting down by the use of necessary force.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for assault and battery committed, as contended, by the defendant upon the plaintiff while the latter was attempting to prevent the former from abating an alleged nuisance.

The parties occupied different lands some distance from a certain dam, made of stone and cement, in the Manoa stream. The plaintiff obtained his water through a ditch leading from one end of the dam. The defendant obtained his from a point in the stream below the dam, the water flowing down the stream to that point through a notch in the middle of the dam. It being a time of drought and the defendant and two others not being able to get water, as they claimed, because the plaintiff took it all at the dam, they were in the act of lowering the notch in the dam when the plaintiff came up and attempted to stop them, whereupon a contest ensued in which the plaintiff was hurt to some extent. There is some dispute as to who began the fight and as to just how the plaintiff was hurt—whether by a blow from the defendant or by slipping when attacking the defendant and then sliding down the outer slope of the dam to its bottom.

The plaintiff's theory is that, assuming the fact of nuisance and the defendant's general right to abate it, that right did not go to the extent of permitting a breach of the peace and consequently that it was the defendant's duty to cease his attempt at abatement as soon as he was resisted and then to have

recourse to the courts to enforce his rights, and that he was liable for all that he did in excess of his rights.

If the plaintiff and the court had adhered to that theory throughout the case, perhaps the verdict might be sustained, though as to that we express no opinion, but after relying on that theory for the purpose of excluding the evidence offered by the defendant to show that he had a water right, that the dam interfered with that right and that he had a right to abate it, the plaintiff and the court proceeded on a different theory for the purpose of getting and giving an instruction that the defendant had shown no right to justify his attempt to break or cut down any part of the dam and that the plaintiff was justified in resisting such breaking or cutting down by the use of necessary force. The defendant excepted to the exclusion of the evidence and giving of the instruction.

The giving of the instruction, especially after the exclusion of the evidence, was clearly prejudicial error. It practically amounted to a direction for a verdict for the plaintiff, and that, too, on propositions that the defendant was denied the right to disprove. The evidence was excluded on the theory that the action was only for the excess to which the defendant went after beginning lawfully, but the instruction was given on the theory that the defendant was a wrongdoer *ad initio*. Moreover, the instruction was prejudicial in itself aside from the exclusion of the evidence. Its first part implied that one could not abate a nuisance of this kind, at least that if he should continue after resistance was offered he would be a wrongdoer from the start. That one may remove so much of a dam as interferes with his right of water in a stream is beyond question. *Colburn v. Richards*, 13 Mass. 420; *Stiles v. Ladd*, 5 Cal. 123. How far he may go after resistance depends on the circumstances. See *Perry v. Fitzhowe*, 8 Q. B. 757; *Burling v. Read*, 11 Q. B. 904; *Davies v. Williams*, 16 Q. B. 546; *Jones v. Jones*, 1 H. & C. 1. The last part of the instruction declared the plaintiff a rightdoer from the start. Even if the defendant were a wrongdoer after resistance was offered, it

would not follow that the plaintiff was a rightdoer. They may both have been wrongdoers. If the defendant was acting within his rights in abating the nuisance, the plaintiff had no right to interfere with him, even if the defendant would not be justified in committing a breach of the peace in order to prevent such interference.

The exceptions are sustained, the verdict set aside, a new trial ordered and the case remitted to the Circuit Court.

Robertson & Wilder for plaintiff.

J. A. Magoon and J. Lightfoot for defendant.

MILTON HOLMES *v.* MANOEL F. MELLO.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED APRIL 25, 1903.

DECIDED JUNE 20, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An action at law lies by one partner against another partner to recover money paid for the use of the defendant to meet his share of expenses of the partnership, such advances being in pursuance of an agreement made before the formation of the partnership and in order to launch the partnership.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$677.82. The declaration contains two counts, one for money paid for the use of the defendant and the other upon an account stated.

One exception is to the granting of a non-suit at the close of the plaintiff's case. Although much evidence sought to be introduced by the plaintiff was excluded, still sufficient was admitted to have justified the jury in finding the following facts: that, the plaintiff and the defendant with eight others

being about to enter into a partnership for the cultivation and sale of sugar cane, the defendant requested the plaintiff to pay for him from time to time such amounts as might be necessary to meet his, the defendant's, share of the expenses of such cultivation; that the plaintiff agreed to make such advances and during the cultivation of the first crop paid out on behalf of the defendant, as his share of such expenses, the sum of \$677.82; that the plaintiff rendered to the defendant a statement of the account showing this amount as due and that the defendant acquiesced therein and promised to pay the same; and that although often requested the defendant has failed to pay.

The motion for a non-suit was based on three grounds, the first and second being practically the same, to wit, that there was a fatal variance between the allegations and the proof in that the plaintiff alleged a general assumpsit and proved a special contract, and the third being that "it appears from the evidence that the advances made by Holmes were made to a partnership of which he is and was at the date of the advances a member; that the partnership accounts have not been settled, that it does not appear by the evidence that there has been a dissolution, settlement and adjustment of the accounts of the partnership."

The general rule undoubtedly is that an action at law will not lie in favor of a partner against another partner upon a demand growing out of a partnership transaction until there has been a settlement of accounts and a balance struck, but the rule is no broader. "Where the cause of action is distinct from the partnership accounts, and does not involve their consideration, or require their examination," the rule does not apply and an action at law will lie thereon between the partners. *Harrison v. Magoon*, 13 Haw. 339, 351. "An action at law lies upon express individual and personal contracts between partners, and it is immaterial whether such contracts relate to the partnership affairs or are wholly distinct therefrom." *Ib.* In the present case, the plaintiff is not suing

the partnership nor is he suing any member for any balance claimed to be due by reason of their relation to each other as partners. No advances were made to the partnership and nothing is due from it. The contract sued on was entered into before the formation of the partnership and amounted simply to an undertaking on Holmes' part to make a loan to Mello and to a promise on the latter's part to repay such loan to Holmes. While the money loaned was used and intended to be used by Mello in paying his share of the partnership expenses, his contract with Holmes was wholly distinct from the partnership affairs. Whatever the state of those affairs may be, Mello's debt remains due to Holmes. No consideration of the profits or losses of the concern is necessary or would be relevant in determining the existence or the amount of that debt. Upon the case as disclosed by the evidence, the plaintiff's remedy is at law. See *Wetherbee v. Potter*, 99 Mass. 354, 363; *Chamberlain v. Walker*, 10 Allen 429, 430; *Edwards v. Remington*, 51 Wis. 336; *Currier v. Webster*, 45 N. H. 226; *Ellison v. Chapman*, 7 Blackford 224; *Wells v. Carpenter*, 65 Ill. 447; *Wright v. Eastman*, 44 Me. 220; *Helmee v. Smith*, 7 Bing. 709, 714; *Venning v. Leckie*, 13 East 7; 2 Bates, Partnership, Sections 868, 874; 15 Encycl. Pl. & Pr. 1036, 1037, 1045-1047; 17 Encycl. Law, 1st ed., 1262.

It is also contended, apparently for the first time in this Court, that the non-suit was properly granted because the defendant's promise was to pay upon the happening of a contingency, to wit, the sale by defendant of a certain lot of land, and that the evidence does not show that that contingency has happened. Assuming that an answer made by the plaintiff on the witness stand, that the defendant "expected to sell a piece of land and as soon as he had sold the land he said he would pay me," was capable of being construed by the jury as meaning that the sale of the land was to be a condition precedent to repayment, yet there was ample evidence from which the jury would have been justified in finding that there was no such condition and that the promise was absolute.

There was no variance between the pleadings and the proof. The defendant's express promise to pay the amount advanced at his request was nothing more than the law would imply under the circumstances. It was optional with the plaintiff whether to declare on the implied promise or to set out the contract specially. See *Turnpike Co. v. Gulick*, 16 N. J. L. 161, 166; *Sanborn v. Emerson*, 12 N. H. 57, 61, 62; *Davis v. Smith* 79 Me. 351, 360; 28 Encycl. Law, 1st ed., 56; 4 Cycl. Law & Pro. 328.

During the cross-examination of the plaintiff, the defendant offered in evidence an agreement concerning the use of the land to be cultivated by Holmes, Mello and the eight others, the party of the first part being the Pacific Sugar Mill, a corporation, the owner of the land, and the parties of the second part the ten planters. That instrument in the opening paragraph first set forth the names of the parties of the second part and recited that they would be "hereinafter designated as 'The Planters'." Subsequently the plaintiff made general and specific offers to prove that the name of the partnership was "M. A. Dias Planting Company" and that this was the same partnership as that referred to in the plaintiff's testimony.

This evidence was excluded on the ground, apparently, that it already appeared that the name of the partnership was "The Planters", and that "M. A. Dias Planting Company" was another partnership, not in any way involved in the proceedings. The evidence excluded was admissible. The instrument in evidence did not purport to show what the name of the partnership was. The designation, "The Planters", was there used merely for the sake of brevity and as a matter of convenience for the purposes of that instrument alone just as the Pacific Sugar Mill was designated "The Mill." That instrument is not and does not purport to be the agreement of partnership between the ten parties of the second part. Moreover, so far as there is any evidence at all on the subject, that evidence tends to show that the "M. A. Dias Planting Company" and "The Planters" are one and the same concern.

The exceptions are sustained, the judgment reversed, a new trial ordered and the case remitted to the Circuit Court.

Smith & Parsons and *Thayer & Hemenway* for the plaintiff.

Humphreys, Thompson & Watson for the defendant.

P. D. KELLETT, JR., Trustee v. JOHN K. SUMNER,
VICTORIA ELLIS BUFFANDEAU, WILLIAM S.
ELLIS, JOHN S. ELLIS, GULSTAN F. ROPERT,
and S. M. DAMON, S. E. DAMON and H. E. WAITY,
partners under the name of Bishop & Company.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 5, 1903.

DECIDED JUNE 25, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A trust cannot be terminated by the consent of interested parties unless all consent, including possible beneficiaries not yet in being or *sui juris*.

"Nearest blood relatives" are not the same as heirs and do not include a wife.

In the absence of exceptional circumstances, a voluntary deed of trust containing no power of revocation, reserving a life interest in the grantor, and with remainders to relatives, is irrevocable.

But under the exceptional circumstances of this case the deed is held to be revocable—it having been executed by a weak-minded and easily influenced aged man, for his own convenience, as he supposed, and in consequence of pressure brought to bear upon him by his relatives, and there being evidence tending to show that the trustee and other beneficiaries as well as the grantor considered it revocable.

A decree will not be reversed for want of a necessary party upon a mere possibility that such party was not represented, when there is reason to believe that it was fully represented, and when the question was raised for the first time on appeal.

The burden is on the trustee seeking to recover a portion of an alleged trust fund to see that all necessary parties are brought in and to show that the sum claimed is subject to the trust.

A trustee of an active trust may sue for the recovery of trust funds without making the *cestuis que trust* parties when his relations with them are not involved.

In suits by trustees, claimants of very remote and uncertain interests under the trust need not be made parties.

A bequest to each of three for the life of the survivor, with a bequest over to the survivor or survivors in case one or two should die before the testator without leaving lawful issue or wife or husband then surviving, and a further gift over in any event on the death of the survivor of the first three, gives nothing to the issue, wife or husband by implication.

OPINION OF THE COURT BY FREAR, C.J.

(Perry, J., dissenting.)

This is in form a bill for the discharge of a trustee and the appointment of a successor in the trust, but the substantial issue is between certain of the defendants as to whether the trust has terminated or not. The suit was begun by the Rt. Rev. Gulstan F. Roper, Bishop of Panopolis, as trustee under a deed executed by the defendant Sumner, but during the hearing, the Bishop being, as was supposed, on his dying bed, the Circuit Judge, with the consent of all parties and upon the agreement that the Bishop's account, showing a balance of \$48,025, was correct, made a decree, accepting the Bishop's resignation and discharging him from the trust, and a further decree appointing P. D. Kellett, Jr., in his place, and expressly authorizing the latter to go on with the suit as if he were the original plaintiff, though no formal amendment appears to have been made substituting him as the party plaintiff. The Judge ordered also, with the consent of all the parties, that

the amount above mentioned, which was then on deposit with the defendants, Bishop & Co., bankers, be paid into court, which was done. The defendant Sumner contended that the trust was terminated and that he was entitled to the \$48,025, in which contention he was supported by his sister Maria S. Davis, who originally was a defendant but whose name was during the progress of the case stricken from the record, and her son, Wally Davis, who was a defendant to the original bill, but whose name was omitted from the amended bill, and opposed by his nephews, the defendants, the three Ellises, including Mrs. Buffandeau (*nee* Ellis). Besides the prayers in the bill for the acceptance of the trustee's resignation, his discharge, the appointment of a successor and the payment of the money to such successor, there were prayers for other and further relief generally and "for such other and further disposition of the sum of \$48,025 as to the court may seem just and equitable," and John K. Sumner in his answer prayed not only for the discharge of the trustee, but that the trust deed be cancelled and declared no longer in force, and that the sum in question be declared his absolute property and that it be ordered paid over to him. The Circuit Judge finally decreed that the deed be and was cancelled and annulled and the trust terminated, that the money be paid to Sumner, that the new trustee, Kellett, convey to him all property not already disposed of under the trust, and deliver to him all documents, &c., and thereupon be discharged as trustee.

The circumstances were, briefly, these: On February 7, 1895, Sumner made a lease, afterwards assigned to the Oahu Railway and Land Company, of certain land, bordering on Honolulu harbor, for 99 years at an annual rental of \$5,500, at the same time giving in the lease an option to purchase the land at any time during the term of the lease for \$100,000. A small portion of the land was reserved for 25 years. Sumner was supposed to have title to only one-half of the land, and his title to that was disputed by the government. On February 19, 1895, Maria S. Davis filed a suit, as next friend of

Sumner, who was absent at his home in Tahiti, to set aside a power of attorney given by Sumner to one Crandall, and to have a receiver appointed to take charge of his, Sumner's, property in these islands, alleging that he, Sumner, was failing in mind and unable intelligently to transact business. The Circuit Judge granted the relief sought, but, upon the return of Sumner from Tahiti, the Supreme Court granted a writ of prohibition to stay further proceedings in the receivership matter. Meanwhile, November 13, 1897, Mrs. Davis brought proceedings to have Sumner put under guardianship as an insane person, which was done. Pending the appeal from the order of guardianship, Mrs. Davis brought another suit, as next friend of Sumner, for the cancellation of certain conveyances made by Sumner after the discharge of the receiver. The conveyances were set aside as having been obtained without consideration and by fraud and undue influence. Also pending the appeal in the guardianship matter, Sumner executed the trust deed in question, on the understanding, as alleged in the answer of the Ellises (including Mrs. Buffandeau) that the Supreme Court would thereupon with the consent of all enter a *pro forma* decree vacating the decree of the Circuit Judge declaring him, Sumner, *non compos mentis*, Sumner then being, as also alleged in said answer, "greatly harassed, annoyed and distressed by the several suits and proceedings hereinbefore referred to and being advanced in years and greatly broken by bodily infirmities and desiring to end his remaining years in peace and without strife and friction with those who were bound to him by ties of blood and to avoid the humiliation, mortification and anguish of having the said order declaring him to be an insane person affirmed by the Supreme Court." Thereafter the Supreme Court entered a decree setting forth a written stipulation to the effect that the petitioner, Mrs. Davis, did not desire to press the proceedings further and that she consented that the decree appealed from be vacated and the matter discontinued, and decreeing accordingly, but without prejudice to any one not a party thereto. Whether

the fact that the trust deed had been executed by Sumner was brought to the attention of the court does not appear. The court apparently vacated the decree below on the theory that the parties, particularly the petitioner, desired to discontinue and that was done without prejudice to others not parties. In July, 1902, the Oahu Railway and Land Company decided to exercise its option to purchase the leased property for \$100,000, and brought suit to compel a conveyance after a demand for the same had been refused, whereupon, on September 4, 1902, Mrs. Davis again instituted proceedings to have a guardian appointed over Sumner as an insane person, and also, as next friend of Sumner, a suit to cancel the lease and option. On September 24, 1902, the Circuit Judge dismissed the last mentioned suit on the ground that Sumner was sane, and on October 13, 1902, the Circuit Judge, on motion of the petitioner, Mrs. Davis, dismissed the petition for the appointment of a guardian and decreed Sumner to be sane. On the same day the Bishop, as trustee, and Sumner, Mrs. Davis, her son Wally, the two Ellises, Mrs. Buffandeau and her husband, executed a deed of the leased property, and also of the reserved portion, to the Oahu Railway and Land Company for \$110,000, and on the next day the railway company discontinued its suit for specific performance. Of this sum, \$10,000 was divided among the attorneys of the various parties other than the Bishop, without regard to whether they had served Sumner or his foes, \$10,000 was paid to the Bishop for the Roman Catholic Church, and \$10,000 to each of the Ellises (including Mrs. Buffandeau) and Mrs. Davis, and \$1,000 to one Cathcart for certain alleged services, leaving the sum of \$975 unaccounted for in the present case, and the balance now in dispute, \$48,025, in the hands of the Bishop, who a few days later, October 21, paid it over to Sumner, who in turn deposited it in the bank of the defendants Bishop and Company, by whom, as stated above, it was paid into court. At the same time the Bishop returned to Sumner a will which was referred to in the deed; and Sumner at once cancelled this and afterwards

burned it. The deed itself was retained by the Bishop to await the preparation of some other document by Sumner's attorney cancelling the deed, &c. The following day the Ellises notified the bankers not to pay out the money to anyone other than the Bishop, and five days later this suit was instituted.

The foregoing is a bare outline. It is unnecessary to go at length into the details as they appear in the voluminous evidence or as may be read between the lines, this latter being the part to which counsel particularly addressed themselves in their oral arguments, if not in their briefs.

The question is whether the trust has terminated, and it will therefore be necessary to set forth the relevant parts of the deed and will creating the trust. The deed (from Sumner to the Bishop and his successors in office) describes Sumner as "a resident of Tahiti, at present temporarily in Honolulu" and recites: "Whereas, the party of the first part desiring that his property and interests in the Hawaiian Islands shall be in charge of some competent and disinterested person, and the party of the second part has kindly agreed to accept the trust and confidence in him hereinafter expressed." The conveyance is expressed to be "in consideration of the premises and in order to effectuate such desire and agreement", and is in trust "to collect all the rents and profits thereof and to pay thereout all taxes and other expenses incurred in respect of managing or attending to the same, together with any expenses incurred by the party of the second part for legal advice or services concerning the same or the management thereof, and to pay the balance thereof from time to time as received by the party of the second part to the party of the first part during his lifetime, and at his death to grant and convey said property and pay any of such unapplied income to such uses and purposes and to such persons as the party of the first part shall by his last Will and Testament, made and executed on the 17th day of September, A. D. 1898, name and appoint, and in default of such appointment, to such persons as shall by

the law of Hawaii be entitled in cases of persons dying intestate;

“And in further trust and with power hereby expressly granted to the Trustee to make such leases and agreements of lease of the said property or any part or parcel thereof, upon such terms and conditions and for such rentals as the Trustee shall think proper, and to collect and give receipts for the rentals, and to collect all moneys now or hereafter due, payable and coming to the party of the first part within the Hawaiian Islands and to apply the same as above directed in respect of the income of said property.

“And also, in trust and with power hereby expressly granted to the Trustee to adjust, compromise and settle all claims of every description now or hereafter made against the party of the first part, in such manner as the Trustee shall think fit and to bring such actions and proceedings in law or equity in respect of said property or any part thereof, or of any other rights or claims of the party of the first part, and to conduct the same to final judgment and execution or adjust, compromise and settle the same as the Trustee shall think fit;

“And in all respects to conduct and manage the said property and the matters hereinabove mentioned as fully and effectually to all intents and purposes as the party of the first part could do.” The trustee accepted the trust.

The will, referred to in the deed as executed the same day, was destroyed, as stated above, but its contents were proved in part as follows: In substance one-fourth of all the property, except the life interest, to the Bishop for the use of the church and the support of Saint Louis College, and then “All the rest, residue and remainder of my property, I give, devise and bequeath to the Bishop of the Roman Catholic Church in Honolulu, in trust to manage the said property and collect the income from the same, and pay the income thereof in equal moieties to William Sumner Ellis, John Sumner Ellis and Victoria Sumner Ellis, the children of my dear niece, Nancy Sumner Ellis, deceased, during their lives and the life of the

survivor of them; but if any of them become bankrupt or insolvent, the trustee shall during the life of each beneficiary apply the annual income in and to the maintenance, clothing, lodging and support of any of them, or of the wife or children of any of them as the trustee shall, at his discretion, think proper. In case at my death my said grand-nephews and grand-niece shall have died without leaving lawful issue or wife or husband then surviving, the shares taken under this will shall descend to and become the property of the survivors, and upon the death of the survivors of the said children of Nancy Sumner Ellis, the property shall revert and become the property in fee simple of the nearest blood relative of John K. Sumner living at the time of the death of the survivors of them, or in case of more than one relative of the same degree of relationship to them in equal moieties, in order that the property may remain in the Sumner family for all time."

The property and the proceeds thereof now in question were part of the property covered by these items of the will.

Several contentions are made to show that the trust has terminated. The suggestion is made that by the terms of the trust deed itself this money should be paid to Sumner, for all the income is to be paid to him during his life and the deed provides further that the trustee is "to collect all moneys now or hereafter due, payable, and coming to the party of the first part within the Hawaiian Islands and to apply the same as above directed in respect of the income." In view of our conclusion on another point, no opinion need be expressed upon this.

Another contention, much urged, is that the trust could be terminated by consent of all parties interested and was in fact so terminated when the \$110,000 was distributed as above set forth. The proposition of law that the trust may be terminated by the consent of all interested seems to be conceded, but it is contended that such consent was not given in this case. Whether the Ellises, the Davises and the Bishop so consented in fact, we need not inquire at this point, nor need we say whether the

Ellises could so consent as matter of law in view of the insolvency clause in the will. It is clear that by the terms of the trust, as set forth in the latter part of the will, Sumner's nearest blood relatives living at an uncertain future time had contingent interests and they are yet undetermined, and so cannot consent. They may be children of Sumner, yet unborn. In order to justify a termination of the trust by consent, all interested must consent. *Brandenburg v. Thorndike*, 139 Mass. 102; *Cartwright v. Cartwright*, 10 Haw. 403; Perry, Trusts, Secs. 104, 920. But, it is argued that such nearest blood relatives are only heirs of Sumner and that when a devise is made to heirs, the latter take by descent and not by devise, and hence that this is merely a case of a reversion to Sumner, and that therefore the consent of such relatives is not required. A sufficient answer to this is that "nearest blood relatives" are not the same as heirs. They are not the same as next of kin according to the statute of distributions nor the same as relatives. Even "nearest relatives" would not, much less would "nearest blood relatives," include a wife,—who would be included under our statute among "heirs." *Haraden v. Larabee*, 113 Mass. 430; Hawkins, Wills, 97, 104; Underhill, Wills, Secs. 590, 591.

A third contention, which in our opinion is sound, is that the trust was revocable by Sumner under the circumstances without the consent of the other beneficiaries.

The Ellises contend that the trust could not be terminated either by the consent of all interested who are now in being and *sui juris* or by Sumner himself, although they were ready enough to participate in its spoliation to the extent of \$62,000. If the trust is not terminable, they and all others who have shared in the trust fund should be required to restore it. No one has offered to do this, and it is doubtful how much of the \$62,000 could be obtained on execution in case the trust should be held irrevocable, even if judgment should be obtained by the new trustee against the several participants. How far, in case the trust were irrevocable, the trustee or his representa-

tives would be liable for the \$62,000 paid out in technical, though unintentional, breach of the trust, we need not say. Whether any of the sums distributed could be recovered by Sumner as having been obtained by fraud or undue influence, in case the trust is held revocable, we need not say. It doubtless would have been much better for Sumner, considering his infirmities and the activity and avarice of his relatives, if the trust could have been kept intact, for he would then have been assured a good income for the rest of his life, but, now that the greater portion of the fund is gone, and the rest would soon go to others under the trust, it may be a question whether it would be better for him to keep the balance tied up, giving him the income only, or to let him have it and get what enjoyment he can from what he is not cheated out of during the brief remainder of his life. While this is the greater portion of his property, he apparently has sufficient in Tahiti to maintain himself. But the court cannot continue or terminate the trust merely according to what may seem to be for his best interests, if under the circumstances he has a right to revoke it.

Courts have swayed somewhat from time to time and differed from each other in their opinions as to when a trust of this nature is revocable by the grantor. At times the view seems to have been taken that the mere omission of a clause of revocation or the mere neglect of counsel to call the attention of the grantor to the advisability of inserting such a clause, is sufficient to show mistake or undue influence and justify revocation, or will at least cast the burden on any one seeking to sustain the trust to prove that it was made deliberately and intelligently with an intention that it should be irrevocable. But the better view at the present time seems to be that those are only circumstances to be taken into consideration with other circumstances and that the real question is whether the grantor intelligently and freely created the trust with the intention that it should not be revocable. Instructive series of cases upon this subject are found in England and Pennsylvania, the present view being set forth in the recent cases of *Hall v.*

Hall, L. R. 8 Ch. App. 430, (overruling L. R. 14 Eq. Cas. 365) and *Kraft v. Neuffer*, 202 Pa. St. 558. The following are other cases of this general character in those jurisdictions. *Frederick's Appeal*, 52 Pa. St. 338; *Russell's Appeal*, 75 Pa. St. 269; *Rick's Appeal*, 105 Pa. St. 528; *Bristor v. Tasker*, 135 Pa. St. 110; *Reidy v. Small*, 154 Pa. St. 505; *Chestnut St. Nat. Bank v. Fid. Ins. Co.*, 186 Pa. St. 333; *Wilson v. Anderson*, 186 Pa. St. 531; *Prideaux v. Lonsdale*, 1 De G., J., & Sm. 433; *Toker v. Toker*, 3 De G., J., & Sm. 487; *Coutts v. Acworth*, L. R. 8 Eq. Cas. 558; *Wallaston v. Tribe*, L. R. 9 Eq. Cas. 44; *Everitt v. Everitt*, L. R. 10 Eq. Cas. 405; *James v. Couchman*, L. R. 29 Ch. Div. 212. See also *Ewing v. Wilson*, 132 Ind. 223; *Garnsley v. Mundy*, 24 N. J. Eq. 243; *Aylsworth v. Whitcomb*, 12 R. I. 298; *Underhill, Trusts*, 102.

If one intelligently and freely creates a trust of this character, although without consideration and although he is to retain the benefit himself for life, he cannot as a rule revoke it as against remaindermen. But under special circumstances, as shown by the cases above cited, such a trust is revocable, and in our opinion, such special circumstances exist in this case. Indeed, this would seem to be a particularly strong case as compared with many of the cases cited above.

We need not consider whether the deed, by referring to a will already made, though on the same day, makes it a part of itself, so as to prevent a defeat of the trust by a revocation of will afterwards; or whether the deed itself can be revoked on the theory that, though in form a deed, it was really merely testamentary in character; or whether the failure of the trust to the extent of more than half the trust fund and the grantor's deprivation of corresponding expected benefits, through undue influence or otherwise, might affect the question; or how far the trust was improvident in locking up for the rest of his life the greater part of the grantor's property or in not leaving the way open to the grantor to make provision for the to him unforeseen and unsuggested contingency of his marrying again and having children; nor need we consider whether the evi-

dence or the pleadings would permit a cancellation of the deed on the ground of insanity, fraud or undue influence at its inception.

It is undisputed that no clause of revocation was inserted, and there is no evidence that the advisability of inserting such a clause was called to Sumner's attention in any way. These are generally regarded as important facts in connection with other facts in cases of this kind. In some instances such facts are shown by the very nature of the trust itself to be comparatively immaterial, as where the trust is created for the express purpose of protecting the grantor from his own intemperate and spendthrift habits, or where a woman in contemplation of marriage puts her property in trust for the express purpose of preventing her husband from getting control of it, for in such cases if the trust were revocable, its purposes could be defeated at any time, in the one case by the desires of the intemperate man or spendthrift overcoming him and in the other by the husband's influence on the wife, and hence in such cases there is good ground to believe that the trust is intended to be irrevocable, at least so long as the reasons for it continue. But, where, as here, the creation of the trust is purely voluntary, without consideration, and for the grantor's especial convenience and by a weak-minded aged man acting under much pressure, the case is different.

If anything is clear in this case, it is that Sumner has never conceded for a moment that he was incompetent to manage his own property, although he acknowledges certain infirmities, such as defectiveness of eyesight and partial loss of memory, and even that he needs advice at times. If there is one thing that he has dreaded, it has been the imputation of insanity. No one has so much as suggested that he is intemperate or a spendthrift. It was not his thought in executing the deed to protect himself from himself, or to provide for his relatives. His need of protection because of mental weakness may have weighed strongly with his sister and his attorneys at the time

as a justification for urging or advising him to execute the deed, but he apparently took a different view of the situation.

If we look to the deed itself, we find in it much that, especially to a man like Sumner, aged and infirm and unfamiliar with law, would indicate that it was of a temporary nature and for his own convenience. It describes him as a resident of Tahiti, temporarily here; it recites that he desires his property and interests here to be in charge of some competent person and that the Bishop had kindly consented to act, and that the deed was made to effectuate such desire; it then proceeds, in declaring the trusts, to enumerate powers found in ordinary powers of attorney, ending with the provision that the trustee is "to conduct and manage the said property and the matters hereinabove mentioned as fully and effectually to all intents and purposes as the party of the first part could do." It reserves to him the entire income for life, and then directs that the property shall go after his death to such persons as he *shall* by his will made the same day appoint, and *in default of such appointment*, to his heirs. It does not appear whether the will was made before, at the same time as, or after the deed, though we presume it was part of the same transaction, but, especially if the deed and will were parts of the same transaction, why were not all the trusts inserted in the deed, if they were intended to be irrevocable? A man like Sumner would naturally suppose the will to be revocable, and the language of the deed also would seem to indicate that to a man like him. Further, the trustee was given no power to sell, and no power to invest the proceeds although the option for the purchase of the property had already been given. It was not at all unlikely that the option would be exercised at any time and the property covered by the deed of trust converted into money. If it were contemplated that the trust was irrevocable, it would seem that ordinary prudence would have called for the insertion of a provision in regard to the investment of the proceeds of the sale. If the deed was executed for the grantor's own con-

venience, this goes far towards furnishing sufficient ground, as shown by the cases, for holding that it is revocable.

If we look outside of the deed, there is little direct light, so far as the circumstances at the time of its execution are concerned. But inferences may be made. If, as suggested by counsel for the Ellises, Sumner was then, as found by the Circuit Judge at the time, *non compos mentis*, and has not since been restored sufficiently to ratify the deed, it ought not to stand in any event. If, as the Ellises allege in their answer, Sumner executed the deed because he was harassed, annoyed and distressed by the litigation in which his relatives were involving him, and in order to end the strife and friction with them, and avoid the humiliation, mortification and anguish of having the decree that he was insane affirmed by the Supreme Court, in other words, if, as the argument seems to be, he was forced or blackmailed into executing the deed for the purpose of tying up his property for his relatives, this also is one of the strongest reasons, as shown by the cases, for holding the deed revocable. There is no doubt that Sumner was greatly annoyed by that litigation and that he deeply felt the humiliation of being declared insane. He was then 76 or 78 years old and at least somewhat weak-minded and easily influenced, and, considering the state of his mind in view of the litigation and the actions and conduct of his relatives, it looks very much as if he was practically forced into executing the deed, and these circumstances afford strong additional ground for holding the deed revocable.

The evidence shows further, so far as it shows anything upon this point, that Sumner himself never regarded the deed as irrevocable. His actions have throughout harmonized with the theory that he believed it revocable. And there is much reason to believe that all the others directly interested, as well as their attorneys at the time of the distribution, thought so too. The Bishop, the trustee, apparently thought so. He not only paid out the greater portion of the trust fund to others on Sumner's orders but he paid the balance of the money to Sum-

ner and delivered the will to be canceled and was ready to cancel the deed, until others interfered. He also accepted \$10,000 from the trust fund as a voluntary gift from Sumner for the Church, although he would have been entitled, for the Church and Saint Louis College, in a few years, to one-fourth of the whole property under the trust. His conversations with Sumner and his attorney, when he paid over the money, and with the Ellises when he tried to induce them to be satisfied with \$10,000 apiece as gifts from Sumner, and the testimony of Father Valentine all go to show that he believed the trust was at an end. No appeal is taken by the trustee. Apparently the suit was brought by the Bishop out of abundant caution to get a judicial determination in view of the fact that the Ellises had questioned the termination of the trust. The six attorneys who represented the various parties at the time of the distribution were of the same opinion, or else they were guilty of deliberately joining in the spoliation of the trust for a share of the booty. The Davises were of that opinion, as they say themselves, and they received \$10,000 of the fund, besides \$5,000 for their attorneys. And, lastly, the Ellises themselves were of the same opinion, however strenuously they may now deny it. The negotiations for the final settlement, resulting in the discontinuance of the suits, the execution of the deed to the Oahu Railway and Land Company, and the distribution of the \$110,000, were somewhat protracted. It was known all along by the Ellises that Sumner needed or desired and expected a considerable sum, at least \$15,000, to take back to Tahiti for the purposes of his business there. The first proposition was to allow Mr. Sumner \$15,000 out of the then expected \$105,000, the attorneys \$5,000, the Church \$10,000 and the Ellises the remaining \$75,000, the last named sum to be placed in the hands of a trustee to pay the income to the Ellises during Sumner's life and then divide the principal among the three Ellises, giving them \$25,000 each. This scheme fell through because of the objection of the Ellises' attorneys that the trustee was not required to give a bond and that his compensation was too

great. After that Sumner seems to have steadfastly refused to give more than \$10,000 apiece out of the expected money. This proposition seems to have been delayed for sometime in its execution through the stubbornness of William Ellis in insisting on having \$15,000. But at last he yielded. The Ellises therefore received \$10,000 each, besides what was paid to their attorneys, thus not only participating in but urgently insisting on a breach or revocation of the trust, as to the greater part of the trust fund, and then, although well knowing Sumner's need and expectation of money for his interests in Tahiti, set up the claim that he could not have a cent but that the entire balance must be kept intact mostly for themselves. Actions speak louder than words, especially subsequent words, although prior words are not altogether wanting here to the same effect as the actions. It is remarkable, we may observe in passing, that, notwithstanding the large interests involved, the length and heat of the negotiations and the number and ability of counsel, there is so little direct evidence as to the exact understanding on the final distribution of the fund. Unfortunately, owing to the Bishop's illness, his testimony could not be obtained, the attorneys in general seem to have been studiously silent, the two Ellis boys were out of the Territory during the hearing, and the testimony of those who did testify is meager upon what was actually said in the negotiations. But it is clear what Sumner's intention was, and what all the relatives, including the Ellises, knew it was, and what they led him to believe, and that they all knew that he gave them the several sums on the strength of that belief, and that was, that upon payment of those sums, he would be rid of them forever so far as the balance of the fund was concerned.

The Ellises contend, among other things, that they are in a different position from that of the Davises, because the latter signed an express release of all further claim to Sumner's property, when they received the \$15,000 paid to them for themselves and their attorneys, while they, the Ellises, did not sign any such release. From this it is argued that whatever

may have been the understanding of the Davises, they, the Ellises, did not intend to relinquish any right to the balance of the trust fund. But this release of the Davises was prepared at the Ellises' request by their own attorneys and its execution was procured by those attorneys, and, so far as appears, Sumner knew nothing about it until afterwards. The Davises apparently signed it on the supposition that the Ellises were to execute similar releases, and Sumner apparently proceeded on the theory that no releases were needed from any of the parties. It may be that the Ellises did intend not to release any claim to the balance of the fund, but, if so, they kept that intention well concealed until they had procured the release by the Davises and had got into their hands as much of the fund as they could for the time being.

Another thing relied on to show that the Ellises did not intend to release their claims to the \$48,025 is that at the last meeting, when the deal was consummated, Mrs. Buffandeau's husband asked Sumner what he was going to do with the rest of the money and that he replied that the Bishop was still his trustee and that they would get the rest of it when he died, and that thereupon one of their attorneys jumped up and said, "that is all we want to know, children, sign the deed" (meaning the deed to the Oahu Railway and Land Company). It is not altogether clear just what was said then. The two Buffandcaus testified as above. The attorney testified that the question and answer by Buffandeau and Sumner were as above, but was silent as to whether he, the attorney, said anything. Mr. Cathcart testified that Sumner replied "Oh, the Bishop is still trustee." Sumner testified that he replied, "It is none of your business; that is my business." One thing, however, does appear, that Sumner, then from 82 to 84 years of age, with all his infirmities and burdened with his trials, was there wrestling practically alone with his relentless relatives and their attorneys, and that when he was asked the question by Buffandeau, he became angry and apparently made whatever reply he did make, in desperation. Mrs. Buffandeau herself testified that

they knew Sumner wanted to take back to Tahiti fifteen to twenty thousand dollars. Mr. Buffandeau himself testified that he asked Sumner the question out of curiosity and good naturedly. The question, moreover, implied that Sumner could do as he pleased with the money. If it was still subject to the trust, why ask what Sumner was intending to do with it? The attorney could hardly have advised as he is said to have done on the theory that that answer of Sumner's was to settle the question whether the balance of the money was to remain subject to the trust as matter of law. He could have so advised, if he did, only on the theory that Sumner was to continue the trust as a matter of his own intention at that time. It is surprising indeed that the Ellises are compelled to place so much reliance upon such a scrap of evidence as this from among all that was said and done during weeks of active negotiations—a mere off-hand reply of an aged man, in desperation to a question of idle curiosity asked by the husband of one of the parties. It remains that the Ellises thought the trust sufficiently revocable to justify their acceptance of \$35,000 of the fund, knowing that Sumner expected by yielding to that extent to their importunities to be free as to the rest so far as they were concerned. This, indeed, might operate as an estoppel so far as the Ellises are concerned.

Under circumstances like these, courts hold that trusts of this nature may be revoked. It is unnecessary to say how far the case should be classed under any one head of equity jurisdiction—such as mistake, fraud or undue influence. It looks very much as if it presented a compound of these and perhaps other ingredients, though, perhaps, not all in equal parts.

It is further contended that the decree cannot be affirmed in any event because of the want of necessary parties, to wit, the wives and children of the Ellises and the Saint Louis College. These, it is contended, are beneficiaries, with either vested or contingent interests, under the trust, and as such are necessary parties. This argument is based on the theory that the will must be given effect as a part of the deed even if it should

never take effect as a will, for there can be no interest under it as a will until the death of the testator. Let us assume that to be the case. The point, as to parties, is not raised by the pleadings and apparently was not suggested in the court below. It is, moreover, purely technical, for these interests, if they existed, were, so far as appears, fully represented in fact by others who were parties, namely, the interests of the wives and children by their husbands and fathers who were parties and who contested the case as vigorously as they could, and the Saint Louis College by the Bishop, who, there is reason to believe, was the legal representative and had full control of the College, and who was not only plaintiff as trustee for all but was defendant as legatee trustee for the College. So far as the College is concerned little need be said in addition to what has already been said. It does not appear just what the exact language of the will was in regard to the College, nor does it appear that the College was not fully represented. Even if the Bishop did not sufficiently represent it as trustee for all or as trustee devisee or legatee for the College, still there is reason to suppose that the Bishop was the only one who could represent it as ultimate *cestui que trust*. Under the circumstances the decree below should not be reversed on the bare possibility that some one else might in law be entitled to appear for it.

Now, as to the wives and children. There are, perhaps, a number of reasons why the decree should not be reversed, at least *in toto*, because these persons were not made parties. Several of these reasons will be stated. In the first place, conceding that the bill has technically some objects for which all persons interested should be made parties or at least be represented, yet most of these other matters were settled by decrees not now appealed from and are not in dispute and have turned out to be of a somewhat incidental nature. The gist of the suit was whether Sumner should be required to pay the money back to the trustee. The suit was brought by the trustee, not by Sumner. The latter had the money. The obligation was on the trustee and others contending the same way not only to see

that all necessary parties were joined but to show that it was Sumner's duty to pay over the money. If they failed in those respects, the money naturally remains with Sumner. Consequently, so far at least as the money is concerned, there is no reason for reversing the decree appealed from. But there would be nothing, on this view, to prevent further proceedings by the wives and children to subject the money again to the trust. They would not be concluded. Secondly, it is contended that, so far at least as the money is concerned, the trustee as plaintiff could maintain the suit against Sumner without joining any others—even the Ellises themselves. For, in a suit whether by or against the trustee of an active trust, to recover a portion of an alleged trust fund the relations between the trustee and the beneficiaries may not be involved. In such case the trustee represents all the *cestuis que trust*, and a decree for or against the former binds the latter in the absence of fraud or collusion. See *Kerrison v. Stewart*, 93 U. S. 159; *Manson v. Duncanson*, 166 U. S. 533; *Sterens v. Bosch*, 54 N. J. Eq. 59; *Clemens v. Heckscher*, 185 Pa. St. 476; *Belding Sav. Bank v. Moore*, 118 Mich. 150; *Cheatham v. Rowland*, 92 N. C. 340. But there is much to indicate that under the circumstances of this case the relations between the trustee and beneficiaries were involved and so we do not rely on this point. Under this theory also it might be contended with some force that there are other matters covered by the decree, aside from the right to the money, in respect of which the trustee did not sufficiently represent the beneficiaries. Thirdly, are not the interests, if there are any, of the wives and children, too uncertain and remote to require them to be made parties? The only clause, if any, under which they could claim in the deed, apart from the will, is that which directs the trustee to convey the property, on the death of the grantor and in default of appointment in the will, to those entitled by Hawaiian law in cases of persons dying intestate. But this is altogether too uncertain. Besides the uncertainty as to default of appointment, there is the uncertainty as to who will be the heirs.

They cannot be ascertained until the death of the testator. In the will itself there are four clauses that may be considered. It is clear, for the reason just mentioned in connection with the deed, that the interest, if any, under the last clause of the will, which directs that the property be ultimately conveyed to Sumner's nearest blood relative or relatives would be too remote and uncertain. Such would be the case also under the first clause relating to the Ellises, which directs that the income be paid to them severally for the life of the survivor, for in that case the wives and children, if they would take at all during the life of the survivor or survivors after the death of one or two, would take by descent from the husband or father and not by purchase under the deed or will. So under the clause relating to bankruptcy or insolvency, they would take no interest whatever. The trustee is not required by that clause to pay anything to the wives or children. He is merely given discretion in case of the bankruptcy or insolvency of any one of the Ellises to apply the income to the support of any of them or of the wife or children of any of them. See *Booram v. Wells*, 19 N. J. Eq. 87. The only remaining clause is that which directs that in case at the death of the testator the three Ellises (probably meaning one or two of them) shall have died without leaving lawful issue or wife or husband then surviving, the shares, &c., shall go the survivors, &c. This is the clause that was at first relied on, the argument being that the wives and children were given estates by implication, but the chief reliance now seems to be upon the bankruptcy clause which we have just disposed of. If any interest is given by this clause, it is a contingent interest only and that, too, one depending on several contingencies—contingencies not only of the uncertain collateral event of the Ellises dying before the testator but of the uncertainty as to the existence or ascertainment of what persons, if any, will take. Will there be any such wives or children at the time in question. If wives, will they be the ones now living? If children, who will be the survivors? We assume that there are such wives and children at the present time.

Are not these interests, if any, too remote and uncertain? See *Temple v. Scott*, 143 Ill. 290. But, lastly, in our opinion, the wives and children did not under this clause take any interests however uncertain. If they took an interest at all, it was by implication. Estates by implication are not favored. If the will is regarded as part of the deed for the purposes of construction as well as for the purpose of creating interests before the death of the testator, it cannot, of course, be construed as giving an estate by implication under the clause in question. But let us look at it as a will for the purposes of construction in this respect. Courts go much further in stretching the language of a will than of a deed in order to give effect to the intention. It is well settled that a devise or bequest to A indefinitely or in fee with a gift over in the event of A's dying without leaving children surviving, gives nothing to the children. The same is true if the prior gift is to A for life only. In the first case the whole estate is given to A and he has the means of providing for his children. In the second case, there would seem to be much reason to suppose that the children, if any, were intended to take after A, but that is not a necessary implication, and so courts take the view that the children are merely mentioned as part of the description of the condition on which the gift over is to take effect, and that speculation as to the intention of the testator cannot be indulged in to such an extent as to give the children an estate. *Si voluit, non dixit*. 1 Jarm, Wills, 563; 1 Underhill, Wills, Sec. 468; *Scale v. Raulins*, (1892) App. Cas. 342; 45 Ch. Div. 299; *Greene v. Ward*, 1 Russ. 262. The same is held also when, as here, the alleged gift by implication would be not by way of remainder but by way of substitution, that is, when the contemplated death of the first taker is in the testator's lifetime. *Cooper v. Pitcher*, 4 Hare 485; *Lee v. Busk*, 2 D. M. & G. 810. It is true that, so strong is the implication in favor of the children when the prior estate is limited for life, courts in such cases sometimes seize upon comparatively slight indications in other parts of the will to hold that the children were intended to take. But

here, aside from the fact that each prior estate is not for the life of the taker but for the life of the survivor of three takers, the only other clause of the will which throws light on the intention of the testator as to the wives and children weakens the view that they were intended to take by implication. That is the bankruptcy clause. That, so far as it goes, shows merely that the Ellises themselves were intended to provide for their wives and children, and that, even if they failed to do that, the wives and children were to be provided for by the trustee in his discretion and not by giving the wives and children an estate. Moreover, that clause was to apply only in the event of the Ellises surviving the testator while the clause in question was to apply only in the event of their not surviving the testator. Again, that clause relates to wives and children while this relates to wives, husband and lawful issue. Further, what estate, if any, is given to the husband, wife or issue by implication? Is it an estate for the life of the survivor of the Ellises? That is all it could be in view of other provisions of the will, but if there is any estate by implication from this clause taken by itself it is either an estate for their own respective lives or an absolute estate. And in what proportions or how would a wife or husband and several children take? Would a wife and several children of one of the Ellises take equally as tenants in common for the life of the surviving Ellis? And, again, if all the Ellises should die before the testator (as the first part of this provision taken literally and by itself seems to contemplate), it is clear that the wives, husband or children could not take at all, even though there would be as much reason for providing for them in that event as in the event of only one or two of the Ellises dying before the testator. There is much room for speculation as to what the testator intended. This is increased by the fact that the will is carelessly drawn and does not clearly express the real intention in several respects. No doubt there is much reason to believe that the testator meant that the wives, husband and children should be provided for in some way in the event named, but that is not a necessary im-

plication. Still less is it a necessary inference that he meant to give them definite estates. If he did mean that, he did not say it. And on the authorities we must hold that they took nothing. The present tendency seems to be to limit rather than extend the doctrine of estates by implication.

The appeals are dismissed, the decree appealed from affirmed, and the case is remanded to the Circuit Judge for such further proceedings as may be proper consistent with this opinion.

T. McCants Stewart for the Trustee.

J. A. Magoon, J. Lightfoot and Geo. A. Davis for Sumner.

Humphreys, Thompson & Watson for the Ellises and Mrs. Buffandeau.

DISSENTING OPINION OF PERRY, J.

It may be assumed for the purposes of this case that a deed of trust irrevocable by the grantor alone may nevertheless be revoked by him if all of the beneficiaries consent and also that the evidence shows that the three Ellises, Maria S. Davis, W. Davis and the Bishop on behalf of the Catholic Church and St. Louis College consented that this deed be revoked and the trust terminated. Still from such consent an effective revocation did not result for the Ellises, the Davises and the two institutions named were not the only possible beneficiaries under the deed. The provisions of the will made September 17, 1898, became, by the express terms of the deed, a part of the deed and this, too, whether the will was made before or after or concurrently with the execution of the deed. It is well settled that if a deed refers to a will for a statement of some of its provisions, the parts of the will so referred to thereby become a portion of the deed just as though they had been incorporated in the same instrument and thereupon take effect, not as a will, but as a part of the deed, that the Ellises, the Davises and the Bishop are not the only possible beneficiaries under the terms of the trust as set forth in the will is made clear in the majority opinion; I concur in the views there expressed on that subject.

The only question remaining is whether or not the deed is revocable by Sumner alone. I say the only question, advisedly, for it seems to me that the question of whether or not the deed should be cancelled or set aside on the ground that it was the act of one incapable of contracting or was executed under mistake or obtained by undue influence or other species of fraud is not before the court for determination. The issue last mentioned is not presented by the pleadings,—on the contrary the parties in their pleadings all proceed on the theory that the deed was validly executed and that the trust thereby created continued until at least some time in the latter part of the year 1902, when, as is claimed in Sumner's answer, a revocation was effected. No averment, either in express words or even by implication, is to be found in any of the pleadings to the effect that the deed was procured by fraud or as a result of misunderstanding or mistake, nor is there any prayer to have the deed, for any such reason, declared null and void and cancelled and set aside. The substance of the averments of Sumner's answer is, admitting the truth of the petitioner's allegation that a deed of trust was executed on September 17, 1898, that such deed was revoked and the trust terminated by reason of certain acts done in or about the month of October, 1902. One averment is that the payments to the Ellises and to Maria S. Davis were made by him "*in contemplation* of the revocation of the said deed of trust and the termination of the right of the said petitioner in and to the said property"; another, that on October 21, 1902, the petitioner delivered over to him (Sumner) the will and certain property "*for the purposes of further carrying out the intention of the respondent as aforesaid to terminate said trust*"; and still another that such delivery and cancellation and certain other named acts of a similar nature were done "*by petitioner and respondent*" "*with the full understanding of the said petitioner that the said trust existing under the said trust deed was to all intents and purposes then and there terminated and ended.*" "*Wherefore*", (that is, by reason of the averments contained in the answer) Sumner prays, not that the

deed be declared null and void and be set aside, but that the deed may be "cancelled and declared to be *no longer* in force and effect." Not only do the pleadings show that the question is not allowed but at the argument each of the attorneys in the case said, in substance, in answer to a specific question by the court, that it was not claimed that the deed should be set aside on the ground that its execution had been obtained by fraud.

Assuming, however, that the question last discussed is presented by the pleadings, my conclusion is that the evidence utterly fails to show that the deed was obtained by any species of fraud whatever. In the first place, I take it to be clear that for the purposes of this case Sumner must be regarded as having been on September 17, 1898, and ever since and as being now mentally capable of contracting and of executing a deed or will. The decree of the Circuit Judge, made shortly prior to that date, declaring Sumner mentally incapable was, on appeal, vacated by the Supreme Court; and on October 13, 1902, a court of competent jurisdiction, in a direct proceeding, made a decree declaring him sane. None of the parties to this proceeding or their attorneys claim that he was at the time in question mentally incapable but, on the contrary, all of the attorneys claim in argument that he was mentally capable. In the second place, the general rule is that fraud is not to be presumed but must be proved by the party alleging it. There is, it is true, an exception, real or apparent, to this rule, in cases where a benefit has been obtained or an advantage gained by one who stands towards the giver or grantor in a relation of trust and confidence, as, for example, where the relation is that of agent and principal, attorney and client, or guardian and ward. In such cases the law, recognizing the very great advantage possessed, by virtue of the relation and of the resulting confidence, by the agent over the principal, the attorney over the client, and the guardian over the ward, in dealings had between them, and in order the more readily to effect justice, does not permit the party having such advantage to retain the benefits unless the entire fairness of the transaction is proven by him. But the

present case is not one falling within the exception. Maria S. Davis and her son,—to say nothing of the fact that the possibility of benefit to either of them under the deed was extremely remote and improbable—did not stand towards Sumner in any relation of trust or confidence. The evidence shows beyond doubt that for a considerable time next prior to September 17, 1898, they had been engaged in litigation which, while intended for his benefit, was regarded by Sumner as antagonistic to him, such litigation culminating in the attempt to have him placed under guardianship. In September, 1898, Sumner, far from placing any trust or confidence in them, regarded them as hostile to him. There is no evidence whatever tending to show that Sumner reposed any confidence in the Ellises, his grandnephews and grandniece, to any greater extent than a man naturally would in those related to him in that distant degree. The Bishop, too, is not shown to have possessed Sumner's confidence to any such degree as would bring him within the class under consideration, or even that he had prior to that time ever acted for Sumner as his agent or adviser or otherwise in any matter of business. None of the attorneys who acted obtained any benefit under the trust, except, possibly, in being paid their fees, but as to those no complaint has ever been made.

The rule, then, and not the exception, applies in this case. The burden imposed by that rule upon Sumner has not been sustained. None of those who were present and took part in the transaction leading up to the signing of the deed or will give any testimony as to what was said or done at that time. The only attempt to introduce such testimony was made by the attorney for the Ellises, but the testimony was excluded, *on Sumner's objection*, on the ground that the witnesses were his. Sumner's, attorneys at the time and that the communications then had between them were privileged. This privilege, if it existed at all, was, it must be remembered, Sumner's and not his attorneys', and it was entirely competent for him to have waived it if light was indeed desired on the transaction. Having shut out this testimony, the *best* evidence obtainable on the

subject, Sumner cannot now be heard to complain that the Ellises did not prove in detail the circumstances attending the preparation and execution of the instruments and the entire fairness of the transaction. The subject of mistake will be referred to with more particularity on another branch of the case.

Is the deed revocable by Sumner alone? And hereunder, first, is it testamentary in character? In my opinion, it is not. "Whether an instrument is a deed or a will depends upon the time when it is to take effect, rather than upon its form or manner of execution. A deed takes effect upon its delivery in the grantor's lifetime. A will takes effect from the death of the testator."—2 Jones, Real Prop. and Conveyancing, 1230. This instrument was intended to take effect upon delivery and to convey at once to the trustee the legal title to the property subject to the trusts specified. The trustee was given active duties to perform and it is necessary that he should have the title in order to carry out the directions of the deed. If the language of the deed means anything at all it means that the grantor placed it beyond his power to make after September 17, 1898, a will of the property covered by the deed. The use of the words "and in default of such appointment" is not an indication to the contrary, for even in the view that they show that the grantor reserved liberty to revoke thereafter the will of that date so as to eliminate its provisions as provisions of the deed, the remainder of the context of the deed shows that the direction to the trustee in the event of such revocation was to convey to those who would be entitled by law in case of intestacy. But I think that the correct construction of the language used (that is, if the will was not made prior to or concurrently with the deed) is that if the will should be actually made on September 17, 1898, its provisions should thereupon become incorporated by express reference as provisions of the deed and no attempted revocation of the will, subsequent to that date, could operate to eliminate those provisions from the deed although it might be operative as a cancellation so far as the disposition of property not covered by the deed is concerned. It is at least

equally clear that if the will was made before or concurrently with the deed, it could not be thereafter revoked so as to effect its provisions as a part of the deed. At whatever hour of the day the will was executed, the provision as to "default of such appointment" may well have been inserted to meet the possible contingency of the will being subsequently declared null and void and set aside by judicial order.

The contention that the nearest blood relatives mentioned in the will are only heirs of Sumner and that when a devise is made to heirs the latter take by descent and not by devise, and hence that this is merely a case of a reversion to Sumner, that the whole equitable title is in Sumner and that therefore he can revoke the deed without the consent of others, is sufficiently disposed of in the majority opinion. In that disposition I concur.

The deed on its face is irrevocable. Much stress is laid upon the fact that the deed recites that Sumner is a "resident of Tahiti, at present temporarily in Honolulu", that "whereas the party of the first part desiring that his property and interests in the Hawaiian Islands shall be in charge of some competent and disinterested person * * * and in order to effectuate such desire and agreement" the grantor doth convey, etc., and that the trustee is authorized "in all respects to conduct and manage the said property and the matters hereinabove mentioned as fully and effectually to all intents and purposes as the party of the first part could do," and it is argued that to a man like Sumner this language would seem to indicate that the deed was revocable and that he would also suppose, naturally, the will to be revocable. So far as the probabilities go, the fact in all probability is that a formal instrument such as this, couched in legal language, would have conveyed to Sumner's mind, if left to him alone to read and study, very little, if any, light as to its meaning, and further that it was not left to him alone to read and study but that the substance and effect of the instrument was explained to him by others of greater intelligence and better versed in those matters. There is no reason

to suppose on the evidence that he was incorrectly advised as to its legal effect. The instrument must be construed as a whole. Its essential, operative parts must be considered as well as the recitals and the general and practically immaterial clause above quoted. So considered the instrument on its face should, in my opinion, be construed and understood as an absolute and irrevocable conveyance.

It is contended, however, that in view of the peculiar and exceptional circumstances of this case, it must be held that at the time of the execution of the deed Sumner understood and intended it to be revocable, that he executed it in its present form by mistake, and that therefore the court must now by decree declare that he has successfully revoked it and that the trust has terminated. The fact that the clause of revocation was omitted is one of the circumstances thus relied upon. Formerly in England and in Pennsylvania and perhaps some other States it was held that the omission of a clause of revocation from a deed such as this was of itself *prima facie* evidence of mistake and of the understanding of the grantor that the deed was revocable and that it was sufficient to throw the burden on the party seeking to sustain the trust to prove that the omission was not by mistake, but this view no longer prevails and it is now generally held that such omission is a mere circumstance which, like any other relevant circumstance, is to be considered and given such weight, one way or the other, as it may be entitled to upon all the evidence. This would seem to be as favorable a rule as those attacking the trust may well expect. The very essence of the inquiry is whether the omission was by mistake or understandingly, and to say that because the clause was omitted that is any evidence tending to show that it was omitted *by mistake* seems to me to be at least a happy method of solving the difficulty. But let it be assumed that the modern rule is good and that the circumstance of the omission may be considered. Still, "the question of the right to revoke a voluntary trust resolves itself into a question of intention, and the proper subject for inquiry in this, as in every

case, is, did the settlor, when he executed the deed, deliberately intend that his settlement should be revocable, or not?"—*Potter v. Trust Co.*, 199 Pa. St. 360, 362.

The deed on its face does not, as I think, contain sufficient evidence of an intention to make it revocable to throw the burden upon those seeking to sustain the trust to show by other evidence that such was not in fact the intention. The circumstances shown by the extrinsic evidence and the inferences derivable from the facts so proved lead me irresistibly to the conclusion that the deed was, at the time of its execution, actually intended to be irrevocable. The motive, too, for the grantor's taking such a course appears. Sumner was an old man, weak-minded and easily influenced. Within at least the four or five years next preceding September, 1898, he had made a number of foolish and improvident business transactions and had been taken advantage of by unscrupulous and designing persons who had secured and for the time being possessed his confidence. Had those transactions been permitted to stand, his property would have been in large part consumed thereby and the rest would soon have followed in a similar way. By various judicial proceedings instituted by her for the purpose, his sister, Maria S. Davis, caused the most important of those transactions to be set aside and the property to be restored to its owner and put an end to the influence of those with whom he had been dealing. While he was capable of being easily influenced to his detriment he was also capable of being persuaded, though at times with much difficulty, of the mistakes he had been led to commit and of the real character of his supposed friends. Finally, in 1898, came the guardianship proceedings and the decree of the Circuit Judge placing him under guardianship. That decree was rendered on June 17, 1898, and Maria S. Davis' consent to its reversal and her discontinuance were given in writing on September 19, 1898, two days after the execution of the deed. From these facts the most natural and the strong inference is that he was advised and influenced, not unduly, but properly and legitimately to make such a deed for

protection from his own weakness and to put an end to the possibility of having his property taken from him by unscrupulous persons. Such advice would have been wise. The execution of the deed was certainly the wisest business transaction the plaintiff ever performed, that is, after he became mentally weak. He was advised in the matter by Messrs. W. R. Castle and P. L. Weaver of the bar, Messrs. W. A. Kinney and S. M. Ballou advised Mrs. Davis and Mr. Alfred S. Hartwell also acted for some one interested, whose name, however, was not disclosed by the testimony, in consequence of an objection by Sumner. Upon the evidence there is not room for even the slightest suspicion that any of these men acted towards Sumner otherwise than with the greatest fairness not only in advising him what to do but in making him fully acquainted with the terms and legal effect of the deed. Sumner was capable of being influenced for good as well as to his detriment and, while it is true that he seemed to abhor above all things being placed under guardianship or being judicially declared mentally incompetent to care for his property, he still was, at times at least, capable of recognizing his own weakness. A sufficient motive for the deed, protection from himself, existed. That he was not a drunkard or a spendthrift does not alter the case. Deeds of trust made by drunkards are sustained by courts, so far as the question of motive is concerned, not because the grantors are habitually intemperate, but because by reason of such habitual intemperance they, like those who are spendthrifts, waste their property and need protection from their own weakness in that respect. Equity should, and I believe does, lend her aid to sustain voluntary conveyances made to protect the grantor from weakness of the nature of that under which Sumner labored as readily as it does in cases of conveyances made as a protection from weakness of other classes. "Where the intent to make an irrevocable gift is perfectly apparent, or where, even in the absence of such a clear intent, a sufficient motive (such as protection against the grantor's own extrava-

gance, or the like) for making such a gift exists, the settlement cannot be disturbed."—Bispham, Equity, pp. 106, 107.

Again, is it natural to suppose that his sister, who had spent the better part of three years in litigation of an extremely disagreeable nature, in the endeavor to save and protect his property and who had obtained the decree (although appealable) of a court of competent jurisdiction placing his property under the control of a guardian, would have yielded all of the advantage so gained by acquiescing in the execution of a deed which Sumner would have the power to revoke at any time, within three months as effectually as after five years? On the contrary, it seems to me that the very strong inference is that she would not have done so and that she gave up the benefit of the judicial proceedings only because by another method equally effective although milder in form the property had been placed beyond the power of Sumner to lose. If it be said that she knew that she could bring new guardianship proceedings at any time if he should revoke the trust, the obvious answer is that that is unreasonable. One who, especially a woman, had just gone through the details of such a contest in court, is not at all likely to abandon results actually obtained for any arrangement of wholly uncertain duration or to consent to renew the contest when that course can be avoided. It is suggested in this connection that the inference is that Maria S. Davis desired and understood the trust to be revocable because it was to her interest that it should be, there being practically no provision in the will for her benefit. But it does not appear that she knew at the time what the contents of the will were and the evidence does show that Sumner was averse, even during the negotiations of 1902, to making known those contents. (Incidentally, this explains why not all the terms of the trust were inserted in the deed itself.) Moreover, I am satisfied from the evidence that, whatever were her motives in the litigation of 1902, Maria S. Davis was, in the proceedings of 1895 to 1898 and in her conduct towards her brother at that time,

not actuated by any selfish motives, but acted solely for what she believed to be his best interests.

The point is made that the Davises, the Ellises, the Bishop and the attorneys, as well as Sumner, all showed by their conduct in the events of 1902 and more particularly by the acceptance of portions of the trust fund, that they understood that the trust was revocable. Assuming that the Ellises so understood the matter in 1902, that throws no light on the question of what *Sumner* understood in 1898, for they are not shown to have taken any part in the transaction leading up to the execution of the deed and their understanding in 1902 must have been based upon hearsay or upon their own construction of the instrument or that of their attorneys if they consulted any. Similarly of the attorneys. They were not present in 1898. Their opinions have value as those of men learned in the law, but not as evidence of the actual occurrences of 1898 or of the belief produced by those occurrences in Sumner's mind. The Bishop, too, is not shown to have been present in 1898. For aught that appears to the contrary, he was merely offered the trust and accepted reluctantly as an accommodation to the old man. Moreover, the evidence shows, as it seems to me, that he concurred in the payments made out of the trust fund because, as he thought, all the beneficiaries were consenting, and delivered the remainder of the trust property to Sumner because of a mistake on his part as to the legal effect of the Circuit Judge's order (in October, 1902,) dismissing the petition for the appointment of a guardian and declaring Sumner sane. When shown by Sumner a newspaper article to the effect that the \$50,000 had been left in trust for the Ellis heirs, the Bishop said: "That is not true, because, you know, Mr. Sumner, you have been discharged by the court and now you are a free man and you can do what you like." As to Sumner himself I doubt very much whether in 1902 the thought ever occurred to him that he could revoke the deed without the consent of the beneficiaries until it was suggested to him at the trial by one of his attorneys. The Davises had brought pro-

ceedings (in 1902) to prevent the execution of the deed demanded by the Oahu Railway & Land Company and the Ellises or some of them had threatened similar proceedings. The Oahu Railway & Land Company wanted the deed signed by all of these parties to secure a title perfect beyond dispute. In order to place himself in a position to execute the conveyance and to secure its execution by the others and also to obtain from them a release of all of their claims under the trust deed or otherwise, and having no thought that there were any other possible beneficiaries, he made the payments out of the proceeds of the sale. Even if, however, Sumner in 1902 did think that the deed was revocable by himself, that fact would be entitled to very little, if any, weight in ascertaining what he thought in 1898 because of his weakness of mind and memory.

The averment in the answer of the Ellises that Sumner, "being greatly harrassed, annoyed and distressed by the several suits and proceedings hereinbefore referred to and being advanced in years and greatly broken by bodily infirmities and desiring to end his remaining years in peace and without strife and friction with those who were bound to him by ties of blood and to avoid the humiliation, mortification and anguish of having the said order declaring him to be an insane person affirmed by said Supreme Court in which an appeal from said order was then pending" executed the deed, is not, as seems to be contended, the equivalent of an admission that he was forced or "blackmailed" into executing the deed for the purpose of tying up his property for his relatives, and is not inconsistent with the claim that the deed was executed freely and understandingly.

As to improvidence. The deed made practically no provision for any future wife or child of the grantor after the latter's death. Ample provision is made for such wife or issue during Sumner's lifetime in that all of the income is reserved to him for that period. Sumner's wife, Ninito, had died only a few months prior to the execution of the deed. While there was still a possibility of his re-marrying and having issue, there

was very little probability, at his age and under all the circumstances, of either. Such a possibility would very naturally escape the attention of Sumner, of those advising him and of all others concerned. Moreover Sumner had some property in Tahiti which would not be affected by the deed,—in his answer he says that he has “large property interests there located.” If the execution of the deed was free from imposition, undue influence and every other species of fraud, mere improvidence would not be a sufficient ground for setting it aside or terminating the trust,—at least not until the contingency, with reference to which alone the conveyance could possibly be deemed improvident, should happen—and would at most be relevant only in so far as it might together with other circumstances tend to throw light on the question of the fairness of the transaction at its inception and of the intention and understanding of the grantor at that time.

The fact that a large portion, more than one-half, of the trust fund has passed out of the control of the trustee at the request or with the consent of Sumner, appeals to me, not as a reason for passing the remainder into Sumner’s control, but as strong evidence of the continued existence of the necessity for protection from himself which, as I believe, prompted the creation of the trust in the first instance.

Further discussion of the conduct and motives of the Ellises, the Davises and the attorneys in the transactions of October, 1902, and comments thereon are here omitted because, except as above pointed out, those matters seem to me to be immaterial and irrelevant in a consideration of the issues involved in this case. If the recent payments or any of them were made under mistake or obtained by undue influence or fraud of any other kind, that might be good ground for setting aside those payments but does not tend to show that in September, 1898, there was any mistake, misrepresentation, undue influence or other species of fraud; and if the court finds that the deed has not been successfully revoked and is of the opinion that the trust should not be terminated, it should not order the money paid

over to Sumner in disregard of the terms of the trust even though the conduct of the Ellises has been such as to estop them from claiming that the trust is irrevocable.

As to the authorities, in none of the more recent cases, as I understand them, whether in England or in Pennsylvania or in any other State, is it held that upon facts such as I have found in this case equity will either enforce a revocation by the grantor or itself terminate the trust. If any of them do so hold, I decline, with respect, to follow them. *Rick's Appeal* and *Frederick's Appeal* and other similar decisions have been distinguished and limited in later Pennsylvania cases to such an extent that there is very little, if anything, left of the extreme doctrines there laid down. "Generally the cases in which voluntary settlements have been set aside have been where there have been fraud or imposition in their procurement; where the design had been to give the settlor full enjoyment of his property for life, with power of testamentary disposition, and at the same time to protect it from his creditors; where the instrument was in itself or in connection with other instruments testamentary in character; where the intention to make the instrument revocable clearly appeared; where the purpose of the settlement had failed; or where the trust created was merely a naked one. The rule is that a voluntary settlement will be sustained and enforced in favor of the beneficiaries, unless it is shown that it was procured by fraud or imposition, or executed under misapprehension of the facts or of the law."—*Potter v. Fidelity Ins. Trust & Safe Deposit Co.*, 199 Pa. St. 360, 365 (1901), approved in *Kraft v. Neuffer*, 202 Pa. St. 558, 565 (1902): "Settlements like that before us, reserving a present interest in the creator of them, and carrying a future benefit or bounty to other designated parties, are very usual. If fairly made and carried into effect, uninfluenced by fraud or circumvention, they cannot be subsequently impeached, as is shown, among other determinations, by our own case of *Ruth v. Reese*, 13 Ser. & R. 434."—*Greenfield's Estate*, 14 Pa. St. 489, 501. See, generally, *Wilson v. Anderson*, 186 Pa. St. 531; *Merriman*

v. Numson, 134 Pa. St. 114; *Reese v. Ruth*, 13 S. & R. 434; *Toker v. Toker*, 3 De Gex, J. & S. 486; *Hall v. Hall*, L. R. 8 Ch. App. Cases 437; *Reidy v. Small*, 154 Pa. St. 505; *Rynd v. Baker*, 193 Pa. St. 486; *Taylor v. Buttrick*, 165 Mass. 547.

The point is made, but evidently not much relied on, that the proceeds of the land sold to the Oahu Railway & Land Company of which the fund in court is a part, is payable to Sumner under the provision of the deed that the trustee is to "collect all moneys now or hereafter due, payable and coming to the party of the first part within the Hawaiian Islands and to apply the same as above directed in respect of the income of said property." Construing the instrument as a whole, I am of the opinion that that clause was not intended to apply to a transaction such as that in question. The purpose of the deed and the motive for its execution strengthen this view.

In my opinion the deed cannot be revoked by Sumner alone and the court should not now terminate the trust. No sufficient reason is shown why it should be terminated and there is a strong reason why it should be continued. Its purpose has not failed. The weakness against which it was intended to afford protection is certainly not less now than it was at the inception of the trust and is perhaps greater. The prayer of the bill for the appointment of a new trustee should be granted and the fund in court should be paid over to such trustee.

IN RE HERBERT C. AUSTIN.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED JUNE 16, 1903.

DECIDED JUNE 27, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The Governor has not authority to suspend an officer, who, by the terms of Section 80 of the Organic Act, must be appointed and may be removed by the Governor by and with the advice and consent of the Senate and who is to hold for four years unless sooner removed.

The provisions of the Audit Act (Laws of 1898, Act 39) relating to the suspension of the auditor were repealed by implication by the provisions of Section 80 of the Organic Act, which are not only inconsistent therewith but indicate an intention to cover the whole subject.

OPINION OF THE COURT BY FREAR, C.J.

The appellant was suspended from the office of Auditor of the Territory by the Governor for certain specified causes from September 25, 1902, to December 1, 1902, when he was removed from office by the Governor by and with the advice and consent of the Senate. He now appeals from the refusal of the present Auditor to issue a warrant for his salary for the period of his suspension.

"The salary follows the title" as a rule (*Macfarlane v. Damon*, 8 Haw. 19, 28) and the salary for the period in question has not been paid to any other officer *de facto* (see *Brown v. Prov. Gov't*, 9 Haw. 311). The question is whether the appellant was rightfully suspended, that is, whether the Governor had the power to suspend.

The appellant contends that this is *res adjudicata* in his favor by reason of a judgment by a Circuit Judge in certain *mandamus* proceedings brought by him against certain officers to compel them to admit him to the possession, &c., of the office, the appeal from which judgment was withdrawn by said officers after this appellant's removal from office and the appointment of his successor. It is unnecessary to consider whether the matter is *adjudicata* or not, for we agree with the Circuit Judge in that case that the Governor did not have the power to suspend.

The President of the Republic of Hawaii had that power under Act 39, Laws of 1898. Section 1 of that Act provided for the appointment of an Auditor-General by the President with the approval of the Senate, to hold office during good behavior, subject to "be removed or suspended" as provided in Section 8. Section 2 provided somewhat similarly for a Deputy Auditor-General, except that appointment was to be on the nomination of the Auditor-General and with the approval of the Cabinet. Section 8 provided, that "the Auditor-General and Deputy Auditor-General may be suspended or removed from office at any time by the Executive Council," for certain specified causes, and that "any vacancy occurring through death, resignation, removal or suspension shall be filled by appointment of the President as prescribed in Sections 1 and 2." If these provisions were still in force, the powers of the President and of the Executive Council would now be in the Governor. Org. Act., Sec. 68.

But the offices of Auditor-General and Deputy Auditor-General were abolished by the Organic Act (Sec. 8), and the new offices of Auditor and Deputy Auditor were created, such officers however to have the powers and duties of the Auditor-General and Deputy Auditor-General under Act 39 of the Laws of 1898 but only "as amended by this (the Organic) Act" (Sec. 77), and it was expressly provided that the Governor "shall nominate and, by and with the advice and consent of the senate of the Territory of Hawaii, appoint the * * * auditor, deputy

auditor," &c. "He may, by and with the advice and consent of the senate of the Territory of Hawaii remove from office any of such officers. All such officers shall hold office for four years and until their successors are appointed and qualified, unless sooner removed," &c. (Sec. 80).

Looking at the Organic Act alone, it is clear that the Governor was not authorized to suspend the Auditor. We may assume for the purposes of this case that the power of appointment carries the power of removal in the absence of constitutional or statutory restriction, and even that the restriction that the appointment shall be by and with the advice and consent of the senate is not sufficient to prevent removal by the Governor alone, and yet it is clear that he could not remove alone when, as here, it is expressly provided that he may remove by and with the advice and consent of the Senate and when it is further expressly provided that the officer shall hold office for four years, &c., unless sooner removed, that is, in the manner specified. If the Governor cannot remove except by and with the advice and consent of the Senate, he cannot suspend alone. Courts differ as to whether the power of removal includes the power of suspension but we know of no authority in support of the proposition that the power of removal with the consent of the Senate and when the tenure is fixed by statute subject only to such removal includes the power of suspension without such consent.

We are further of the opinion that the provisions of Act 39 of the Laws of 1898 relating to suspension were repealed by the Organic Act. We need not say whether the provision in Section 8 for filling vacancies occurring through suspension, made suspension within the purview of that Act practically the equivalent of removal. The provisions relating to suspension, assuming it not to be the equivalent of removal, are inconsistent with the provision of the Organic Act that the officer shall hold for four years unless sooner removed. Moreover, the provisions of the Organic Act were evidently intended to cover this subject completely and not to leave in force stray incidental words and

phrases here and there in the midst of other more substantial provisions which were wholly abrogated or replaced by other provisions. *The Paquete Habana*, 175 U. S. 677, 685. The provision in Section 6 of the Organic Act which continued in force the laws of Hawaii, expressly applied to only such laws as were not inconsistent with the Constitution or laws of the United States or the provisions of the Organic Act.

The Auditor should have issued the warrant. As to its approval by the Governor after its issuance, as required by Section 116 of the Audit Act, we have nothing to do in the present case.

The appeal is sustained and the Auditor is directed to issue a warrant or warrants to the appellant for his salary as Auditor from and including September 26, 1902, to and including November 30, 1902.

C. W. Ashford for appellant.

Attorney General L. Andrews for the Auditor.

McBRYDE ESTATE, LIMITED, *v.* JAMES R. GAY, McH. ROBINSON, A. ROBINSON and F. GAY, partners do in business under the firm name of GAY & ROBINSON.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED APRIL 21, 1903.

DECIDED JULY 1, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When the boundaries of an ill, determined by a Commissioner of Boundaries, are set forth by the Commissioner in a general description and also in a particular description made and entered in the record immediately thereafter, the particular description must prevail over the general in case of a conflict.

A call in a general description reading, "returning on the eastern bank of the river in all its windings and turnings to place of commencement", does not necessarily place the line at the water's edge but is capable of being understood as meaning that the line is on the bank at a reasonable distance from the water, and will be so construed where from the remainder of such description and from the particular description made in pursuance of the general and from a map accompanying the particular and made a part thereof, the intent is apparent that the line should so run *on* the bank following bearings and distances given.

OPINION OF THE COURT BY PERRY, J.

This is an action, brought under the statute, to quiet the title to the Ili of Kuiloa, Kauai. The ili is bounded by the Ahupuaa of Hanapepe on all sides but one, to wit, the makai or easterly end, the line on that side running across the mouth of the Hanapepe stream. It is undisputed in this case that the Kapiolani Estate, Limited, a corporation, is the owner of the Ili of Kuiloa, that the plaintiff holds a lease of the same for the term of fifteen years from April 1, 1901, that the defendants have no title or interest to or in the ili and that they (the defendants) are in possession of the Ahupuaa of Hanapepe under a lease for thirty years made in 1887 by the Commissioners of Crown Lands. The sole question is one of boundaries,—whether or not a certain strip of land on the eastern side of the Hanapepe stream is a part of the Ili of Kuiloa.

The ili was awarded by name only. On November 15, 1870, Queen Kapiolani, under whom the plaintiff claims and who at that time held the title to the property, filed before the Commissioner of Boundaries for the Island of Kauai a petition for the settlement of its boundaries. After publication of notice and service on the Commissioners of Crown Lands as owners of Hanapepe, hearing was had on December 13, 1870. In the commissioner's record of proceedings, written in a bound volume, at pages 15 and 16, the entry under the date last named is: "The petitioner appeared and called several witnesses

whose evidence is now on file, and from said evidence decision was given in favor of the petitioner (the defendants not having called any witnesses) and survey ordered as follows:

“Survey of Kuiloa by James Gay.

“Commencing at two small stones let into the ground a distance from a double-stemmed Pride of India Tree of 70 links, bearing E. 4° N. Magnetic. Thence N. $67^{\circ} 43'$ W. a distance of 210 links along the Eastern bank of Hanapepe river. Thence N. $77^{\circ} 28'$ W. a distance of 761 links crossing a branch of Hanapepe stream (as shewn on plan). Thence N. $81^{\circ} 26'$ W. a distance of 942 links crossing the principal stream of river and running to the Eastern side of a Water Lead, the centre of which forms the boundary of the said land. Thence following the said Water Lead to where it joins the Hanapepe river, having the following bearings and distances:” (Here follow four bearings and distances, the last one running) “to the river bank. Thence following the river to the sea, with the following bearings and distances:” (Here follow seven bearings and distances.) “Thence S. $55^{\circ} 35'$ E. crossing a sand-spit and mouth of Hanapepe river to a rocky point overlooking the sea, a distance of 1260 links. Thence returning on the Eastern side of the river to commencement, with the following bearings and distances:” (Here follow twelve bearings and distances.) “Thence N. $40^{\circ} 41'$ E. a distance of 310 links crossing a slight bend and cutting off a portion of the river as shewn on plan. Thence “(here follow five bearings and distances). “Thence N. $57^{\circ} 7'$ E. to commencement a distance of 602 links.

“The whole comprising an area of 67 A. 1 R. 0 P.

“Note. The bearings are from the true, *not magnetic*, North.

(Signed) “Jas. W. Gay, Surveyor.

(Signed) “Duncan McBryde,

“Commissioner Boundaries.”

At page 149 of the same book appears an entry dated December 13, 1870, but written, as shown by preceding entries, after October, 1875, and reading as follows:

“Kuiloa Boundary neglected to be entered.

“Decision rendered 13th December, A. D. 1870.

“Commencing at two small stones in the ground a short distance from a double-stemmed Pride of India tree near the East

bank of the Hanapepe river and following along the Eastern Bank of said Hanapepe river. Thence crossing a branch of Hanapepe river. Thence crossing the principal stream and running to the Eastern side of Water-lead the centre of which forms the boundary of this land. Thence following the said Water-lead to where it joins the Hanapepe river. Thence following the river to the sea. Thence crossing a sandspit and mouth of Hanapepe river to a rocky point overlooking the sea. Thence returning on the Eastern Bank of the River in all its windings and turnings to place of commencement.

(Signed) "Duncan McBryde,
"Commissioner of Boundaries,
"Fourth Judicial Circuit."

At the trial in the court below, the plaintiff offered in evidence a document indexed, "Ili of Kuiloa, Decision," and reading as follows:

"Decision rendered by Duncan McBryde, Commissioner of Boundaries for the Island of Kauai in reference to the Boundary of Kuiloa an ili in the Ahupuaa of Hanapepe rendered on the 13th day of December, A. D. 1872.

"Commencing on the Eastern side of the Hanapepe river near a Double Stemmed Pride of India tree and thence running a short distance along said Eastern Bank. Thence crossing the river and running to the Eastern side of Water Lead the centre of which forms the boundary of this Land. Thence following said water lead to where it joins the Hanapepe river. Thence following the river to the sea, thence crossing a sand spit and mouth of Hanapepe river to a rocky point overlooking the sea, thence returning on the Eastern side of the river to place of commencement.

(Signed) "Duncan McBryde,
"Commissioner of Boundaries,
"Island of Kauai."

This document was, on the defendants' objection, excluded on the ground that it was not the decision of the Commissioner, —that the decision was that entered on page 149 of the bound volume. One exception is to the ruling holding such document inadmissible and another to the decision of the Circuit Court

that the strip in question is not included within the boundaries of Kuiloa.

It may be assumed for the purposes of this case that the paper last referred to was correctly excluded, for, considering only the evidence which was admitted, we think that a new trial must be ordered.

The decision of the Commissioner, assuming such decision to be that set forth in the entry on page 149 of the bound volume, was reached and rendered after the hearing of the evidence adduced and before the making of the survey entered on pages 15 and 16 and the description then found by the commissioner to be the true one was, necessarily, in general terms only and was intended to be made more specific by a surveyor who should first actually run the lines on the ground. The record, page 15, shows unmistakably that such survey was ordered by the commissioner immediately after the rendering of his original decision; and the description resulting from that survey as entered on pages 15 and 16 was accepted by the commissioner and adopted by him as the particular statement of the boundaries. It is insufficient to say that the signature of the commissioner appended at the bottom of page 16 is a signature to the record and not to the notes of survey. The notes of survey as entered became a part of the record so signed and of the decision. The commissioner did not copy the notes of survey in the volume merely as matter of interest to show how that particular surveyor interpreted or understood the general description, but to make clearer what the true boundaries were determined by the court to be. Over the commissioner's signature appears the statement that he ordered the survey "as follows," that is, as in those notes set forth. Under the circumstances, if there is any conflict between the general and the particular descriptions, the latter should, in our opinion, prevail.

The reference in Gay's description to a map made by him made that map a part of the description. With the aid of the map, if not otherwise, the boundaries are easily ascertained

and certain. Black lines are there used to denote the water's edge at the very sides of the stream and red lines to denote direct bearings or "meander lines," as they are sometimes called; "green," as the surveyor specifically says in a note on the map, "denotes the boundary of Kuiloa." On the western side the green line runs along the centre of the water-lead, as called for by the general description, and then along the winding shoreline of the main stream, in other words, "follows" the stream as required by the general description, and then crosses the sand-spit and the mouth of the stream as directed. On the mauka end, likewise, its location is accepted by both sides as complying substantially with the general description. On the east, however, it runs for much of its length at a distance of from 100 to 150 feet from the water's edge and when nearing the initial point there is a departure of about 350 feet. The contention of the defendants is that the general description makes the water's edge the boundary, that the bearings given in Gay's survey are of meander lines only, intended merely to locate the water line from point to point, and that, if there is any conflict, the general description found on page 149, "returning on the Eastern Bank of the River in all its windings and turnings to place of commencement," must prevail. In case of conflict our opinion is, as already stated, that the particular description must prevail. As to Gay's bearings on the East, one of them is shown by the map to be a meander line with the irregular boundary at the water's edge but the others, the map shows, are not meander lines. Not only does the map show this, but other considerations strengthen the view. The survey practically closes; it is unusually exact considering the large sizes and the irregular size of the property. The approximate location of the Pride of India tree, not now in existence, is agreed upon by both sides, and so is the initial point. For the first 400 feet after leaving the initial point and to the point where the stream is directed to be crossed the mauka line admittedly runs, not along the water's edge, but about forty feet distant. If on the

whole eastern side the water's edge was intended to be the boundary, then the initial point, now agreed upon, would of necessity be moved westward 400 feet to the water's edge; but that clearly was not intended. It is urged that one of Gay's courses as shown on the map cuts off a bend in the stream, that it could not have been intended to actually cut off a portion of the stream, and that this supports the view that even the surveyor intended the water line as the true boundary. So far as the intent of the surveyor is concerned, the answer is plain. Not only does the green line on the map cut off the bend in the stream, but in the description itself he says, "Thence N. 44° 41' E. a distance of 310 links *crossing a slight bend and cutting off a portion of the river* as shown on plan,"—further evidence of an intent to depart from the water's edge; and this language was adopted by the commissioner in his particular and final description.

No substantial conflict necessarily exists between the last call of the general description as entered on page 149 and the corresponding calls of the particular description as understood by us. "On the eastern bank" does not necessarily mean "along the water's edge." The "bank" may be broad or it may be narrow; it may cover a wide extent of contiguous ground. (No testimony was adduced as to the precise nature of the ground contiguous to the river on the east.) It is capable of meaning *on* the bank, even if it may also mean *along the inner edge of* the bank. If liberty to run the line *on* the bank and at a reasonable distance from the water is recognized under the first part of this call, then the words "in all its windings and turnings" do not necessarily add an inconsistent direction. The line even of *on* the bank may well follow the windings and turnings of the river. There is no direction as to the eastern side, as there is as to the western, to *follow the river*. The words in the earlier part of the same general description, "along the eastern bank," have not been deemed by any one as an impediment to a departure from the water's edge.

It is contended that the map cannot be considered as a part of or as an aid to the particular description, because there is no evidence that the commissioner saw it. The point is not well taken. The map is specifically referred to in the surveyor's description. It was the duty of the commissioner to examine it before adopting the description as his own. Having adopted that description the presumption is that he did his duty and examined the map.

The exceptions are sustained, the judgment set aside and a new trial ordered.

Messrs. Kinney, McClanahan & Bigelow and S. H. Derby for the plaintiff.

Messrs. Robertson & Wilder for the defendants.

JOHN II ESTATE, LIMITED, *v.* R. KAHINU MELE.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED FEBRUARY 25, 1903. DECIDED JULY 10, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The evidence in the case held sufficient to support a finding that the possession of certain land by the defendant and her predecessors in interest, even though permissive at its inception, was, for more than twenty years next preceding the commencement of the action, hostile and under such circumstances as to bring home to the true owner notice of its adverse character.

OPINION OF THE COURT BY PERRY, J.

The errors complained of are alleged to have occurred in the trial of an action of ejectment concerning a piece of land situate within the Ahupuaa of Waipio in the District of Ewa.

Oahu. The plaintiff at that trial proved a paper title to the greater part of the land in dispute. The defendant's sole defense as to the whole of the land was of adverse possession. While other errors are assigned, the main reliance is now upon the contention that the court erred in refusing to direct a verdict for the plaintiff on the ground that a *prima facie* case of adverse possession had not been established and that the verdict is contrary to the law and the evidence.

The plaintiff claims under John Ii, to whom a Royal Patent of the ahupuaa, based upon a Land Commission Award, was issued in 1875. The precise date of the award does not appear. Ehu, under whom the defendant claims, applied for and obtained from the Land Commission in 1851 an award, although, it would seem from the evidence, the description contained in the award did not cover all of the land which he then occupied. Upon the latter award a Royal Patent was issued in 1852. The piece now in dispute adjoins that which is covered by the award to Ehu. The declaration in the action of ejectment was filed December 29, 1899.

Ample evidence was adduced to have justified the jury in finding that for a period of more than twenty years next preceding the commencement of the action the defendant and her predecessors in interest had had actual, open, notorious, continuous, and exclusive possession of the land. Ehu's possession commenced at some time prior to the sitting of the Land Commission. The plaintiff's particular contention is that the possession so held at that time must necessarily be deemed to have been by permission of the konohiki, that, upon the authority of *Dowsett v. Maukeala*, 10 Haw. 166, it must be presumed to have continued permissive after the award of the title to the owner of the ahupuaa and that there was no evidence to justify the jury in finding that the character of the possession changed after the award became adverse. Whether the court held in *Dowsett v. Maukeala*, or whether the correct view is, that the possession of a kuleana-man prior to the sitting of the Land

Commission must necessarily be held, *as matter of law*, to have been by permission of the konohiki, we need not say. The decision would seem to show on its face that there was *evidence* in that case that such permission had been *in fact* given; and in other essential respects the evidence in that case differed from that in the case at bar, for there the presiding judge instructed the jury that the occupation of the defendants had not been notorious, exclusive or continuous, and the evidence was that the land was unfenced and not definite in area or boundaries and that the defendants paid rent to the plaintiff within the statutory period. It may be assumed for the purposes of this case that the possession held by this defendant's predecessors in interest prior to the award of the ahupuaa was permissive. In our opinion, sufficient evidence was adduced to have justified the finding that it thereafter became hostile and was under claim of ownership and under such circumstances as to have charged the true owner with notice of the adverse claim. The evidence was sufficient to support the following findings: that the land in dispute was treated by Ehu and his successors in precisely the same manner as the land covered by the description in Ehu's award, after as well as before the issuance of the award; that the two portions were regarded as constituting but one piece and were enclosed within one fence; that Ehu thought that in securing the award he had obtained title to the whole piece; that Ehu and his successors maintained continuously the fence around the property, substituting in later times one of imported materials for one of rough Hawaiian timber; that the first grass house, the only dwelling on the premises, stood on the portion now in controversy, that that house was later substituted by a second of similar materials and that still later a modern building was erected on the same spot; that the occupation of the premises was in all respects apparently that of an owner; that Ehu was not a servant of the konohiki; that neither Ehu nor any of his successors ever paid to the konohiki or to the owner of the ahupuaa any rent, whether in money or in

labor or otherwise; and that beginning with 1878 the defendant and her predecessors paid the taxes on the land. There was also evidence, although it was slight, from which the jury may properly have drawn the inference that in 1870 the owner of the ahupuaa recognized the defendant or her predecessors as the owners of the premises in question. Upon all of the evidence the jury may well have found that the holding, even though permissive at its inception, was, for more than the statutory period, under claim of ownership and hostile, and may also have found, properly, that the circumstances were such as to bring home to the owner of the ahupuaa notice of the adverse character of the possession. The verdict cannot be disturbed.

The other assignments relate to rulings concerning the admissibility of evidence. We find in them no ground for granting a new trial.

The judgment is affirmed.

J. A. Magoon and J. Lightfoot for plaintiff.

Robertson & Wilder for defendant.

VICTORIA by Pihaleo, her next friend v. PALAMA.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED APRIL 28, 1903.

DECIDED JULY 14, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an action against the father for damages resulting from the wrongful act of his minor child, of the age of seven years and nine months, it is not error for the court to instruct the jury that the father is responsible in damages where the evidence clearly shows that the minor itself would be liable at the common law.

OPINION OF THE COURT BY GALBRAITH, J.

Victoria, a minor, by her next friend; Pihaleo, prosecutes this action in trespass against the defendant seeking to recover \$1000 damages for alleged personal injuries resulting from gun shot wounds inflicted by the defendant's son. A trial was had to a jury and a verdict returned for the plaintiff for \$200. The defendant comes to this court on exceptions.

It appears that the defendant's son, a minor, while playing with a shot-gun, claiming "that he did not know it was loaded," pointed it at the plaintiff who happened to be near by, and went through the act of shooting, with the result usual in such cases. The gun was loaded and the charge of bird shot took effect in the plaintiff's face and one eye, completely destroying the sight of the eye and injuring her otherwise. The gun belonged to a Japanese employed by the defendant and was taken by the boy from the veranda of the house where it had been placed by the owner. The shooting was not in the presence of the father and it does not appear that he knew that the boy was playing with the gun prior to the shooting.

It is contended that the defendant, the father, is liable in damages resulting from the wrongful act of his minor son under Sections 1241 and 1874, Civil Laws.

The court charged the jury, in part, as follows: "Under the law I instruct you that the defendant is liable in damages to the plaintiff for the injury to her person by reason that she was shot in the eye by the son of the defendant, a boy of seven years and nine months at the time of the shooting, the sight of one eye was completely destroyed."

The defendant excepted to the giving of this instruction and now urges that it contains an erroneous statement of the law of the question and that the liability of the father, under the facts of this case, is not absolute but is a question that should have been submitted to the jury under proper instruction.

Under the Penal Laws (Sec. 21) an infant under seven years is incapable of committing an offense against the criminal laws of the Territory and between the ages of seven and fourteen his liability depends largely upon his knowledge and understanding and must be determined from the evidence in each particular case. (Sec. 22.) These sections merely embody the common law on the question of the criminal liability of infants. 1 Blackstone, p. 464; 4 id, p. 23.

An entirely different rule governs when the issue is whether or not an infant is responsible for torts committed. In actions *ex delicto* the general rule is that infants are liable in damages in the same manner as adults. Cooley on Torts, 103; *Hutching v. Eugel*, 17 Wis. 234, 238, 239; *Conway v. Reed*, 66 Mo. 346; *Peterson v. Haffner*, 59 Ind. 130; *Bullock v. Babcock*, 3 Wend. 391; *Conklin v. Thompson*, 39 Barb. 218.

It was held in *Day v. Day*, 8 Haw. 715, that, under Sections 1241 and 1874, the father was responsible in damages for the tortious act of his minor child only in those instances where the child itself would be responsible at the common law.

If this is the proper construction of sections 1241 and 1874, and we assume that it is for the purposes of this case, then the law in this jurisdiction is that the father can be held responsible in damages for the torts of his infant in every case where the infant itself would be liable at the common law.

There is no dispute as to the facts in this case. Infancy alone is relied on as a defense. This is not sufficient. The evidence shows that the shooting was not accidental but was done in thoughtless or careless wantonness. There could be no serious question that as a matter of law the infant was liable for the injury inflicted. Under such circumstances it was not error for the court to direct a verdict for the plaintiff, leaving to the jury to determine the amount of damages. *Union Pacific R'y Co. v. McDonald*, 152 U. S. 262.

Another exception was taken to the refusal of the court to give two instructions requested by the defendant. These in-

structions set out a reasonably fair statement of the law relating to the criminal liability of infant but this was not the law applicable to this case.

The exceptions are overruled.

Smith & Lewis and Louis J. Warren, attorneys for defendant.

No brief for plaintiff.

L. AHLO v. C. BOLTE and THE KANEOHE RANCH
COMPANY, LIMITED.

APPEAL FROM JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 18, 1903.

DECIDED JULY 14, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Where a complainant asks for and is entitled to a decree of dismissal without prejudice, the fact that such dismissal is without prejudice should be made clearly to appear on the face of the decree.

OPINION OF THE COURT BY PERRY, J.

This suit was instituted in August, 1902, the answer was filed the following month and a replication thereto on February 25, 1903. On February 24, 1903, the complainant filed a discontinuance reading, "Plaintiff discontinues the above suit," and at the same time moved for a decree dismissing the bill without prejudice, stating that that course was followed because he believed it to be to his best interests to seek a remedy at law. Respondents thereupon, on the same day, moved for a decree dismissing the bill *with prejudice*, basing such motion upon an affidavit to the effect that one David Rice, a resident of Boston, Mass., had come to Honolulu for the sole purpose of testifying in this suit and was anxious to return to his home, and that the

respondents had incurred large expense and great inconvenience in preparing for the trial. On February 25 the complainant filed a motion to amend his discontinuance by adding the words "without prejudice" and on the following day a withdrawal of the discontinuance and also a motion in these words: "Plaintiff herein being advised by counsel that it is for his best interests to cease further proceedings herein and to bring appropriate proceedings at law instead covering the matters in controversy herein hereby moves the court for an order and decree dismissing plaintiff's bill of complaint without prejudice, plaintiff to pay costs." The court declined to decide whether the dismissal should be with or without prejudice and signed a decree reading, "Upon motion of plaintiff and payment of costs to be taxed, the bill stands dismissed," specifically holding that the question whether the decree so signed would operate as a bar to other proceedings between the same parties and concerning the same subject matter was one to be passed upon when raised in some subsequent proceeding. The complainant appealed.

There is much authority in support of the view that, as a general rule, a complainant may, before trial and before decree, final or interlocutory, voluntarily terminate his suit by discontinuance or dismissal as of right. Without going to that extent, however, and assuming that the granting of leave to discontinuance or dismissal is within the discretion of the court, still such discretion is a legal and not an arbitrary one and leave will ordinarily be granted almost as matter of course. In exceptional cases, perhaps, where since the institution of the suit the respondent has by decree or otherwise acquired new rights or where his interest would be otherwise prejudiced by a dismissal without prejudice, leave may properly be refused. No such showing has been made as will bring the case at bar within the exceptions. The complainant should have been permitted to discontinue without prejudice, and this was the end which he sought both by the motion for leave to amend the discontinuance and by the final motion for a decree of dismissal.

It is contended, however, and the position of the Circuit Judge seems to have been, that correct practice does not permit a specific statement in the decree as to whether or not the dismissal is without prejudice. We cannot take this view. Courts should, in their own orders and decrees, as well as in the contracts and other instruments drawn up by and between individuals, favor the use of such language as will make the intent entirely clear and thus leave no room for subsequent misunderstandings and possible litigation. In equity a simple decree of dismissal, without more, is presumed to have been upon the merits and is a bar. *Durant v. Essex Company*, 7 Wall. 107, 109. It is at least capable of the construction that it was upon the merits. Where, then, the party is entitled to a dismissal *without prejudice* and the court making the decree so rules and intends that such shall be its effect, why not say so specifically and avoid the possibility of future controversy on the point? That, we think, would be the correct course under such circumstances. If, on the other hand, the court below was of the opinion that the dismissal should be absolute and should operate as a bar, it should have so ruled definitely and thus have enabled the complainant to decide intelligently as to what course to pursue in view of such ruling.

The appeal is sustained and the cause remanded to the Circuit Judge with instructions to amend the decree by adding thereto the words "without prejudice."

Kinney, McClanahan & Bigelow for complainant.

Robertson & Wilder for respondent.

THE TERRITORY OF HAWAII *v.* ABRAHAM FERNANDEZ.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 20, 1903.

DECIDED AUGUST 3, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Penal statutes are strictly construed.

In a statute which prescribes that no one shall store in certain places "more than one case of naphtha and one case of benzole, nor more than ten cases of petroleum, kerosene oil or any oil of which the component part is petroleum, naphtha, or spirits of turpentine", the words "any oil of which the component part is petroleum", &c., are held not to include oils which consist entirely of petroleum, &c.

OPINION OF THE COURT BY FREAR, C.J.

The defendant was convicted in the District Court of Honolulu and again on appeal, jury waived, in the Circuit Court, of causing to be stored on the premises of the Hawaiian Hardware Company, Lt'd., of which he was manager and treasurer, more than ten cases of spirits of turpentine, namely, forty cases, contrary to the provisions of Section 1507 of the Penal Laws, and the only question now brought to this court on exceptions, is whether the case is within the statute. That section reads as follows:

"No person shall receive, keep or store or cause to be received, kept or stored, or aid or assist any person in receiving, keeping or storing, or have at any one time on any premises owned, leased or occupied by him, except the storehouse provided

therefor by the Government, more than one case of naptha and one case of benzole, nor more than ten cases of petroleum, kerosene oil, or any oil of which the component part is petroleum, naptha, or spirits of turpentine."

Oil or spirits of turpentine is a pure substance obtained by distillation from the crude turpentine which is oleoresinous. It is often mixed with gasoline for purposes of commerce, and in that state it is more inflammable than in its pure state, but in the present case it is admitted to be pure. The question is whether spirits of turpentine, that is, the pure article, is covered by the words "any oil of which the component part is * * * spirits of turpentine." The difficulty lies with the words "the component part." Do these apply when "the whole" is spirits of turpentine? This language is found substantially the same nine times in this and the next six sections. Apparently its use was intentional if not felicitous.

Several constructions may be suggested for the words "any oil of which the component part is petroleum, naptha, or spirits of turpentine." They cannot be confined to oils consisting entirely of petroleum, &c., to the exclusion of oils consisting only in part of any of those substances. The use of the word "part" and the mention of naptha and petroleum in the preceding clauses prevent that construction. They mean at least oils consisting in part only of any of those substances. Whether the use of the word "the" before "component" and the obvious object of the statute would exclude oils of which only a very small part consisted of any of those substances, or whether the use of the word "the" and the construction of the word "component" as meaning "composing" or "constituting" would permit of limiting the words to oils of which the material or characterizing part is one of the named substances, we need not say. The question then is, whether these words should be held to apply to oils consisting entirely, as well as to those consisting in part, whether in large or any part, of any of those substances. The purpose of the statute and to some extent the construction of

the words "the component" as "the characterizing," if permissible, would favor the view that pure oils as well as mixed oils were intended, but the use of the word "part" and the mention of naphtha and petroleum in the preceding clauses, and especially the limitation of the amount of naphtha to "one case" in the preceding clauses, while "ten" cases are mentioned when "the component part" is naphtha, point strongly in the other direction.

This is a penal statute and must be strictly construed. If the legislature intended to include pure spirits or turpentine in the description in question, it did not sufficiently express its intention.

The exceptions are sustained, the sentence set aside, and the case remitted to the Circuit Court with directions to discharge the defendant.

Attorney General L. Andrews for the prosecution.

W. A. Whiting and C. F. Clemons for the defendant.

PACIFIC SUGAR MILL v. THOMAS G. THRUM.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 15, 1903.

DECIDED AUGUST 3, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A deed therein expressed to be for one dollar and other valuable consideration but which was in fact for a consideration of one hundred dollars, cannot legally be refused registry by the Registrar of Conveyances on the ground that not all the consideration money was therein set forth.

OPINION OF THE COURT BY PERRY, J.

Mandamus to compel the respondent as Registrar of Conveyances to register two certain deeds. The petition shows that in each deed the consideration is stated to be "one dollar and other valuable consideration," that in fact the consideration for one of the deeds was the sum of forty dollars and that for the other one hundred dollars, and that the refusal of the Registrar to register was based on the fact that the consideration was incorrectly stated in each deed.

The schedule (C. L. Sec. 941) of the act relating to stamp duties contains the following item: "Conveyance upon the sale of any property, real or personal, or rights therein, upon the principal or only deed or instrument, when the purchase or consideration money therein expressed shall not exceed \$500, \$1.00," and prescribes the rate of stamp duty to be paid in cases where the consideration exceeds \$500. Section 924 of the same act provides, "All consideration money shall be set out in words at length in all instruments, and all other considerations affecting the liability of an instrument to duty shall be set out fully." Does the failure to set out correctly the amount of the consideration, when, as in the case at bar, the variance between the real and the stated consideration does not affect the liability of the instrument to duty but is wholly immaterial in that respect, justify the Registrar in refusing to record the instrument? In our opinion, it does not. The object of the act is to secure revenue for the government and that of section 924 and other similar provisions is to enable the proper officers to obtain all of the revenue due and payable under the schedule. An examination of the act as a whole shows this and so does the sentence in Sec. 924, "and all *other* considerations *affecting the liability of an instrument to duty* shall be set out fully."

The only provision of the statute by way of penalty or prohibition material in this connection is that expressed in Section 927. "No instrument requiring to be stamped shall be recorded

by the Registrar of Conveyances, * * * unless the same shall be properly stamped." Even if the words "therein expressed" in Sec. 941 are to be understood as meaning "therein expressed as directed in Sec. 924," the amount of the duty as so ascertained remains the same in this case and the instruments are properly stamped in accordance with the requirements of Sec. 941 if a stamp of one dollar is affixed to each. If the variance instead of being \$39 or \$99 was fifty cents or one dollar and both amounts within the \$500 limit, must the intent of the Legislature be held to have been to withhold from such an instrument the right of registry? We think not. Such differences are not of the essence of the matter but are wholly immaterial.

The order sustaining the demurrer and dismissing the application is reversed and the case remanded to the Circuit Judge for such further proceedings, not inconsistent with this opinion, as may be proper.

C. W. Ashford for petitioner.

P. L. Weaver, Assistant Attorney-General for respondent.

MARY K. TIBBETS v. S. PALI, as Guardian for Oliva
Lahela.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 22, 1903.

DECIDED AUGUST 3, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Exceptions taken to a judgment of a Circuit Court to this court do not suspend such judgment so far as to prevent the running of the six months' limitation within which a writ of error may be issued under Section 1443, C.L.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff sued out a writ of error in this court to the Circuit Court of the First Circuit. The defendant presented a motion to quash the writ on four separate grounds.

It appears from the record that the judgment was entered in the case in the Circuit Court on the 29th day of August, 1899, and a bill of exceptions allowed and filed on September 5th, 1899; that the exceptions were argued in this court, November 25, 1902, and overruled December 10th, 1902, and the writ of error was issued on the 9th day of June, 1903.

The first ground of the motion to quash is that the "writ was not issued within six months from the rendition of the judgment complained of." This ground seems to be well taken.

It is contended on behalf of the plaintiff that the exceptions taken to this court suspended the operation of the judgment of the Circuit Court for all purposes and prevented the running of the six months statute of limitation within which the writ must issue and that this period of limitation only commenced to run from the overruling of the exceptions by this court, namely, December 10, 1902, and that the writ was issued within six months of this latter date.

The statute, Section 1443, C. L., authorizes the writ to issue, "at any time before execution thereon is fully satisfied, within six months from the rendition of judgment." The phrase "rendition of judgment" used in the statute can only refer to the judgment by which the plaintiff claims to be aggrieved, namely, the judgment of the court to which the writ is directed, in this instance the judgment of the Circuit Court, rendered on the 29th day of August, 1899.

This precise point seems to have been passed on by this court, in *Cummins v. Iaukea*, 10 Haw. 1, 3, where it was raised, as in this case, by motion to quash the writ. In that case the judgment complained of was entered May 28, 1894. Exceptions were taken to this court and overruled October 15, 1894, and

the writ of error was issued on December 17, 1894. In sustaining a motion to quash the writ on the ground that it had not been issued within six months from the rendition of judgment, the court said: "We fail to appreciate the soundness of this position. The judgment on the verdict was entered on May 25, 1894; exceptions had been overruled and there was nothing left to be done to perfect the judgment. The writ of error was sued out on the 17th of December, nearly seven months after the judgment was entered."

In the case at bar the writ was not issued until over three years and nine months after the judgment was entered. This is entirely too late.

The motion is granted and the writ is quashed on the ground that it was not issued within six months from the rendition of judgment.

J. J. Dunne for plaintiff.

C. F. Peterson for defendant.

TERRITORY OF HAWAII *v.* GEORGE ELI FERRIS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 15, 1903. . DECIDED AUGUST 4, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A party who neglects to claim his right of challenge to the grand jury, before they retire, waives it, although he may be imprisoned at the time.

The right, if any, of an accused to have the assistance of counsel at the impanelment of the grand jury, is waived if he neglects to claim it, even though imprisoned at the time.

Where one who is detained in custody awaiting action by the grand jury does not notify the court that he is financially unable to employ counsel for his defense and does not request the assignment of counsel, it is not error for the court to fail to make such assignment prior to the arraignment.

At the arraignment a deputy of the Attorney General may read the indictment.

Upon a motion to discharge a defendant, made after plea of not guilty, on the ground that he has not been duly arraigned, one who, with the acquiescence of all concerned, acted at the term of court at which the indictment was presented as a deputy of the Attorney General must be presumed, in the absence on any showing to the contrary, to have been duly authorized to act in that capacity.

The use of intoxicating liquors by members of the jury pending the trial, and before the final submission of the case, such liquor having been furnished by one of their own number, will not, in the absence of a showing that prejudice to the defendant resulted therefrom, vitiate the verdict.

A court of record may, even at a subsequent term, cause amendments to be made to the minutes of its proceedings, kept by the clerk, to the end that the same may conform to the actual facts and truth of the case.

Verdict held not contrary to the evidence.

OPINION OF THE COURT BY PERRY, J.

The defendant was convicted of the offense of murder in the first degree and sentenced to death. The case comes to this court on thirty-one exceptions.

Exception 1. Upon the calling of the first witness for the prosecution the defendant objected to the taking of any testimony and moved for a direction to acquit on the grounds (a) that he had been deprived of the right, claimed to be secured to him by the Fourteenth Amendment to the Constitution, to be present at impanelment of the grand jury which returned the indictment against him and also of the right, claimed to be secured to him by the sixth amendment, of having the aid and advice of counsel in such impanelment, (b) that he had not been arraigned upon the charge presented in the indictment,

and had made no plea thereto, and that there was an untrue endorsement upon the indictment to the effect that he had pleaded guilty thereto, and (c) that he had been deprived of a trial of his cause before the regular jury for the August, 1902, term of the court and had been compelled to proceed to trial before another jury.

Rule 6 of the rules relating to grand juries, prescribed by this court in accordance with Section 83 of the Organic Act, provides that "before the grand jury retires, the prosecuting officer or any person held to answer a charge for a criminal offense, may challenge the panel or an individual juror, for cause to be assigned to the court." The indictment against the defendant was found by the grand jury impaneled for the August term, 1902, of the Circuit Court of the First Circuit. At the time of the impanelment of that jury, the defendant was in jail, held to answer for the offense for which he was subsequently indicted. He made no request for leave to be present at the impanelment. No cause of challenge is shown or claimed to have existed.

The right to challenge a grand jury panel or an individual juror did not exist at common law but is statutory only. In this Territory it is given by rule of court, and in order to avail must be exercised before the jury retires. The privilege so granted by the rule may be exercised or not by the accused at his option and if he knows of no sufficient cause of challenge or for any other reason sees fit to waive the privilege, he may do so. If the accused expresses no desire to challenge, the court may properly regard the silence as a waiver. The fact that the defendant was in jail at the time of the impanelment does not, in our opinion, alter the case. The May term was one of the regular terms prescribed by law. The defendant knew that his case was awaiting action by the grand jury and must be presumed to have been aware of the law concerning the terms of court. It was for him to have indicated his desire, if any, to be present at the impanelment. Having failed to do so, he cannot suc-

cessfully claim that he was denied the privilege. The great weight of authority supports this view. "Nor does it appear, nor is it contended, that the prisoner asked, or demanded, or was denied, the right to a challenge. He did not attempt to assert, nor was he prevented from asserting, the right of challenge; nor is it claimed, as we have before observed, that any cause of challenge, either as to the panel or any individual juror, actually existed. His counsel take the broad ground that, as he was imprisoned at the time the grand jury was impaneled and sworn, he had no opportunity to challenge the panel, and that the indictment should have been set aside. Had it appeared that he had been denied this right, or been prevented from exercising it, and that any sufficient cause of challenge existed, a far different question would have been presented; but to allow a prisoner to sleep upon his rights until after indictment found, as in this case, and then to hold this very negligence as fatal, puts it into the power of almost every person under arrest to avoid the indictment by failing to object to the grand jury, or else forces the court or prosecutor to drag him, however reluctant, to the court room, whenever the grand jury is to be impaneled and sworn." *Maheer v. State*, 3 Minn. 329, 330. "To have this effect" (of rendering the indictment worthless) "the prisoner must have applied for leave or requested permission to appear and challenge the jury. It was not the duty of the court of sessions to bring him into court for the purpose of exercising this privilege. It is the prisoner's business to know when the court meets, and if he desires to challenge the jury, to apply, if in custody, to the court, to be brought into court for the purpose; and if he fails to do this, he waives his privilege of excepting to the panel of any member." *People v. Romero*, 18 Cal. 90, 94, 95. See also *State v. Hinckley*, 4 Minn. 261, 272; *Webb v. State*, 40 S. W. (Tex., 1897) 989, 990; *Ross v. State*, 1 Blkfd. 390. The fact that no cause of challenge is shown to have existed and that therefore no preju-

dice resulted to the defendant, would perhaps of itself be sufficient ground for overruling the exception on this point.

The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense." Assuming that this applies not only to the actual trial but as well to preliminary proceedings including the impaneling of the grand jury, still the defendant was not denied the right in question. The constitutional provision left him at liberty either to appear in person or to employ counsel, as he might see fit to do. Of itself it placed no obligation on the Territory to provide him with counsel. He did not signify a desire to be represented by counsel and was not refused permission to do so. Nor was there any violation by the court of Section 657 of the Penal Laws, which provides that "in all cases of felony in which the party accused is unable to employ counsel for his defense, the court may assign him counsel from among the licensed practitioners, who shall use every lawful exertion in his behalf without fee or reward, upon pain of contempt to the court." It may be assumed that this section too applies to preliminary proceedings. But where the accused is in prison and permits the impaneling of the jury to pass by without making known to the court he is unable to employ counsel and without requesting the assignment of counsel, how is the court to know that he is indigent? There is no presumption of indigency; and a man, even though indigent, may desire and if he does so desire should be permitted to present his defense without the assistance of counsel. The trial judge may not even know and in some instances doubtless does not know until the grand jury reports or until arraignment who the accused is or that such an indictment is to be presented. There is no denial of the right, if it is an absolute right, until at least the court is informed that the necessity for the assignment exists. In this case, as soon as the court was so informed, to wit, at the arraignment, an assignment was made. On this point also it may be added that it

is not shown or claimed that there was any cause of challenge either to the panel as a whole or to any individual juror or that counsel could have rendered any assistance to the defendant at that stage of the proceedings.

As to arraignment. From the clerk's minutes it appears that on May 22, 1902, the defendant was called to the bar for arraignment, that the indictment was read to him by E. A. Douthitt, Assistant Attorney-General, and that to the indictment the defendant pleaded not guilty; that thereupon, the defendant being without counsel, the court assigned counsel for his defense; that counsel so appointed at once moved for leave to withdraw the plea and that such leave was granted and the plea withdrawn; that after two continuances the defendant, on May 27, 1902, again entered a plea of not guilty to the indictment as so read; and that, on motion of the defendant's attorneys, the cause was then continued until the August term. On the back of the indictment is this endorsement: "Plea: May 22. Plea of not guilty. Upon motion of C. F. Reynolds, Esq., it is ordered plea of guilty be withdrawn, and continued until Friday, May 23, at 10 a. m." (Signed) M. T. Simonton, Clerk. "May 27. Deft. pleads not guilty. Case continued until Aug., 1902, Term to be set." (Signed) M. T. Simonton, Clerk

It is contended that this endorsement might have misled some juror into the belief that the defendant had made a formal admission of guilt. We do not regard this as possible. The note is a brief one, occupying but a very few lines in consecutive order. If any juror read the words, "it is ordered plea of guilty be withdrawn," he must have read the whole note; and, so read, it is entirely clear that the absence of the word *not* was a mere clerical error and that at no time was a plea of guilty entered. The main point, however, in this connection seems to be that Mr. Douthitt was not authorized by law to read the indictment. The sole object of arraignment is to inform the accused of what the charge against him is. That object was fully

accomplished in this case. By pleading to the indictment the defendant would seem to have waived the objection now made; but let it be assumed that it was not so waived. The contention is that the office of Assistant Attorney General has no statutory existence and that the only officers who can legally present an indictment are the Attorney General and such deputies as he may appoint. The applicable provisions of the statutes are as follows: "In all cases of offenses against the laws of this Territory, triable only by a Court of Record, the accused shall be arraigned and prosecuted by an indictment by a legal prosecutor of the Territory." Section 615, P. L. "The Attorney General shall appear for the Government personally or by deputy, in all the courts of record of this Territory, in all cases criminal or civil in which the Government may be party, or be interested." Section 1013, C. L. Mr. Douthitt acted at that term of court, with acquiescence of all concerned, as a deputy of the Attorney General. The presumption is that he was duly authorized by the Attorney General to so act. We do not decide that an indictment may not be read by one other than the Attorney General or one of his deputies; no opinion is expressed on that point.

The objection with reference to the trial jury has been abandoned. We find in the record no cause for sustaining it.

Exceptions 2 to 27 inclusive and 29 are to rulings made during the trial upon objections to testimony. We have carefully examined the record with reference to them all, including nine which have been expressly abandoned, but can find nothing to require or to justify a reversal of the verdict. In most of them the rulings were clearly correct. Perhaps in one or two instances a different ruling might properly have been made, but the error, if any, was not prejudicial. The matters were not such as to possibly affect the result of the trial. No evidence offered by the prosecution was admitted which was not admissible and very wide latitude was allowed the defendant in cross-examination of the witnesses produced against him.

Exception 28. At the close of the case for the prosecution, the defendant moved to dismiss the indictment and for a directed verdict on the grounds named in exception 1, already disposed of, and on the further ground that there was no evidence to connect the defendant with the commission of the crime or to show that the deceased was John Watson or that the deceased met his death from a wound inflicted by a knife or any other instrument in the hands of the defendant or from any other wound received at the hands of the defendant. Were this case of a less serious nature, we would be inclined to characterize this motion and exception, in so far as it relates to the alleged lack of evidence, as frivolous; but mindful of the gravity of the charge and of the sentence we have carefully read the transcript of the evidence. We have no hesitation in saying that a complete *prima facie* case was established by the prosecution and that the motion was properly denied. The evidence adduced by the prosecution was such as, standing by itself, to have amply justified the jury in finding the following facts: that at about eight o'clock on the evening of April 16, 1902, the defendant was standing on the front verandah of the lodging house of one Meyers situate on Queen Street in this city, talking to Meyers and perhaps others about horses; that John Watson, the deceased, then approached from without and asked who was talking about horses or who it was that said he could ride horses or some similar question and that thereupon an argument ensued between him and the defendant on the subject, Watson standing at the head of the steps on the left side going up, leaning against the railing and with both hands behind his back, and Ferris standing one step lower on the opposite side of the steps and about four or five feet from Watson; that during the conversation, which lasted only a few minutes, Ferris said that Watson had called him a son of a ——— some days before, that Watson denied this, that Ferris repeated his assertion and asked Watson, "Did you mean it?" That Watson at first remained silent but, Ferris insistently repeating the question, finally said, "Well,

if I did call you a son of a —— I did mean it"; that without warning Ferris immediately dealt Watson, who was still standing in the position already described, a heavy blow on the left side in the region of the chest; that Watson staggered, walked back a few steps towards the body of the house and then forward again and fell, one Daniel Smith catching him as he fell, blood issuing from a wound in Watson's left side and from his mouth; that a few moments later Watson was dead; that immediately after the assault Ferris left the spot and a few moments later the premises and ran away and was not found, although diligent search was made for him by the police, until the next day; that the wound was caused by a knife wielded by Ferris and that Watson's death was caused by the wound so inflicted and was not due to any other cause; and that about eight days prior to the date of the assault Ferris, pointing to Watson who was some distance away, had said to one Blackwell, a witness for the prosecution, "See that son of a ——; I will fix him yet". Upon the evidence then before it the jury would have been justified in finding that the killing was committed not in the heat of passion but in cold blood and with premeditated malice aforethought.

Exception 30 is to the verdict on the ground that it is contrary to the law and the evidence and the weight of the evidence. This is sufficiently disposed of by what is said concerning exception 28. It may be added, however, that the defendant took the stand in his own behalf and admitted that, at the time and place already stated, he stabbed John Watson, the deceased, with a knife similar to that introduced in evidence by the prosecution. His claim was that he did so in self-defense, that during the conversation at the Meyers house Watson had suddenly come towards him and grabbed him by the shirt bosom with his left hand, tearing the shirt, at the same time having his right hand in his hip pocket, and that as Watson took hold of him he, Ferris, thought his life was in danger, drew the knife and dealt Watson the blow. But the overwhelming weight of the evidence

was against the defendant's version of the occurrence. The evidence was clearly sufficient to support the verdict.

Exception 31, to the denial of the defendant's motion for a new trial. The motion was filed September 12, 1902, and was based upon errors alleged to have occurred at the trial and already passed upon in this opinion and upon the further grounds that members of the jury separated during the trial without leave of court and partook of intoxicating liquors during the trial to such an extent as to render it probable that the verdict was affected thereby.

The jury was sworn and the actual trial commenced on the morning of September 4, 1902. At 5:30 p. m. the court adjourned for the day and the trial was resumed on the following morning at eight o'clock. At 10:15 p. m. the jury retired for deliberation and at 12:30 o'clock the next morning rendered their verdict. The night from the 4th to the 5th the jury spent in the upper floor of this Judiciary Building, occupying as a bed-room what is now Circuit Judge De Bolt's court room and two or three adjoining rooms, including Circuit Judge Gear's chambers, for lounging and other purposes. The alleged separation consisted simply in this: that at about 10:30 p. m. one or two of the jurors were in the hall-way near their bed-room and two or three other jurors in Judge Gear's chambers. All, however, were at all times in charge of an officer and in his view. The point as to separation can not be sustained, in fact it has been abandoned.

During the evening just mentioned some of the members of the jury drank beer, not exceeding two glasses each, furnished by one of their number. No evidence was adduced tending to show that any of the jurors became intoxicated or was under the influence of the liquor so used and each of the jurors deposed on oath that none of them was thus affected. The trial judge in overruling the motion evidently found, and we think the finding was correct, that the use of the liquor did not affect the consideration of the case or influence the verdict. While the

use of intoxicating liquor by a jury during the trial of a capital case, except in instances of absolute necessity, is deserving of severe censure and condemnation, such use is not of itself, where the liquor is not furnished by one of the parties to the cause, necessarily a ground for the granting of a new trial. The material inquiry in such cases is whether the defendant was prejudiced thereby, in other words, whether the use was such as to affect the mind of any of the jurors and thus deprive the defendant of the benefit of the condition of mind of each and all of the jurors to which he is entitled; and if it appears that the defendant was not prejudiced, the verdict can not be reversed. This is the modern view, shared in by the great majority of courts. See *People v. Leary*, 105 Cal. 486; *Jones v. People*, 6 Col. 452; *State v. Bruce*, 48 Ia. 530; *Pratt v. St.*, 56 Ind. 179; *State v. Cucuel*, 31 N. J. L. 249; *State v. Washburn*, 91 Mo. 571; *Burgess v. Territory*, 1 L. R. A. (Mont.) 808; *State v. Madigan*, 57 Minn. 425; *Rider v. State*, 9 S. W. (Tex.) 688; *Roman v. State*, 41 Wis. 312.

The motion for a new trial, as originally presented, was passed upon September 13, 1902. On April 20, 1903, the defendant filed a motion for "re-hearing of the motion for a new trial", specifying as new grounds for the reversal of the verdict that the record did not show that the defendant was present at the impanelment or swearing of the trial jury, or at the trial, or at the rendition of the verdict, or at the passing of sentence, or that, prior to the passing of sentence the defendant was asked whether or not he had anything to say as to why sentence should not be passed. The clerk's minutes were at that time in fact defective in the particulars named, but the trial judge, in a written decision rendered upon the motion in question, and dated April 23, and filed April 25, after reciting that (although the clerk's minutes did not show it,) the fact was that the defendant was present at all of the times named and was asked prior to the passing of sentence whether he had anything to say as to why sentence should not be passed, ordered that the clerk's minutes

be amended so as to conform to the truth and to the facts as in the decision set forth and that the order be entered *nunc pro tunc* as of the August Term, 1902. The minutes were amended as directed except as to the defendant's presence at one of the continuances granted and as to the asking of the formal question at the time of sentence; as to these two matters, the minutes still remain silent.

It is contended that the court had no authority to order the amendments. We think otherwise. The court was satisfied as to the actual facts and these were not disputed by the defendant. There was no contention that he had not been in fact present at any stage of the trial or that he had not been asked the question. Not only was it competent for the trial court to make its record conform to the facts but it was its duty to do so. See *Kaufman v. Shain*, 111 Cal. 16; *Lewis v. Ross*, 37 Me. 230; *Gibson v. Chouteau's Heirs*, 45 Mo. 171; *Frink v. Frink*, 43 N. H. 508; *Bank v. Emerson*, 10 Paige 359; *State v. Pierre*, 3 So. (La.) 60; *Burnett v. State*, 14 Tex. 455; *Pay v. Wenzell*, 8 Cush. 317; *In re Wight*, 134 U. S. 136. As to the two matters with reference to which no corrections were made by the clerk, it is sufficient to say, without passing upon the question of the necessity of the defendant's presence at a motion for a continuance or of putting the formal question referred to, that the decision and order of the judge sufficiently show that the defendant was in fact present and that the question was asked.

The point is also made that the trial judge exceeded his jurisdiction in ordering the amendments because the bill of exceptions had been already filed. The bill bears one endorsement showing it to have been filed on January 31, 1903, and another showing it to have been filed April 21, 1903. It is dated January 30, 1903. The date of its allowance does not appear. If it was allowed before the so-called motion for a re-hearing was heard or decided, the bill does not present the question of the correctness of the ruling and order made upon that motion. If, on the other hand, that hearing and decision preceded the allow-

ance of the bill then, if the cause was before the Circuit Court for the purpose of the presentation of the motion, it was equally before the court for the purpose of rendering a decision on the points raised.

Every one of the twenty-two instructions requested by the defendant was given, with an amendment to one only, and that a correct amendment. No exception was noted to any part of the charge.

The exceptions are overruled.

Attorney-General Andrews; W. S. Fleming, for the prosecution.

E. C. Peters and E. A. Douthitt for the defendant.

C. BOLTE, E. K. BULL, J. J. SULLIVAN and PAUL R. ISENBERG, on behalf of themselves and all other stockholders in the Club Stables, Limited, a corporation, v. C. H. BELLINA, W. E. BELLINA, H. H. PERRY and CLUB STABLES, Limited.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 17, 1903.

DECIDED AUGUST 6, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Directors stand towards the corporation in the relation of trustees to a cestui que trust and when they vote to themselves salaries or other compensation for services such salaries or other compensation cannot be allowed to stand unless shown to be fair and reasonable.

OPINION OF THE COURT BY PERRY, J.

This is a bill in equity praying for an injunction restraining the respondent C. H. Bellina, the manager and a director of the respondent corporation, from paying to himself and to the respondents W. E. Bellina and H. H. Perry, as assistant managers, they being also directors, certain salaries alleged to be exorbitant and excessive and for an order requiring those three respondents to repay to the corporation all moneys received by them as salary from September 10, 1901, over and above the amount of a reasonable compensation for the services rendered by them. The court below, upon motion of respondents, dismissed the bill at the close of the complainants' case "for insufficiency of proof and lack of equity." It is from that ruling that the present appeal was taken. Complainants Isenberg and Sullivan have, however, subsequently withdrawn their appeals.

Undisputed evidence shows that the respondent C. H. Bellina was appointed manager of the corporation by the directors at a meeting held on September 9, 1901; that in the end of that month he fixed the salaries of W. E. Bellina and H. H. Perry as foremen or assistant managers at \$200 each per month and that in addition to such salaries the foremen had the use, free of charge, of a cottage belonging to the corporation theretofore rented at the rate of \$20 per month; that at a meeting of the directors held November 14, 1901, the directors present being Bolte, Perry and the two Bellinas, the salary of the manager was fixed at \$300 per month to date from September 10, 1901, Bolte voting against the motion on the ground that such salary would be excessive; that no formal complaint was made against the salaries until August 5, 1902; that on the last named date, at a meeting of the directors at which were present Bolte, Isenberg, Perry and the two Bellinas, Bolte moved, seconded by Isenberg, that the three salaries in question be reduced \$100 per month each, but the motion was lost, the three other directors voting against it; that no further action was taken or complaint

made by Bolte or Bull until December 1, 1902, on which day they addressed a letter to the Board of Directors, protesting against the salaries as being unreasonably high, claiming that each of the three men had been overpaid \$100 per month, asking the Board to demand repayment of the excess amounting in all to \$3933.30 and, in case of non-compliance with such demand, to institute in the name of the corporation appropriate proceedings to compel such repayment, and giving notice that they themselves, the writers, would bring suit if the Board failed to do so; that at a meeting held on December 11, 1902, the two Bellinas and J. J. Carreiro being the only directors present, the Board, acting upon that letter, refused to comply with the requests made or to reduce any of the salaries and passed a resolution declaring the compensation to be reasonable and ratifying and confirming its own action and that of the manager in the matter and allowing and confirming all payments theretofore made on account of such salaries; that H. H. Perry left the employ of the corporation in August, 1902; that during all of the time mentioned C. H. Bellina held 181 shares of the capital stock of the corporation, and W. E. Bellina 15 shares and H. H. Perry, until the transfer by him in August, 1902, of a portion of his interest 105 shares; that the capital stock of the corporation is divided into 500 shares; and that W. E. Bellina is the brother of C. H. Bellina. The present suit was commenced December 27, 1902. While the experts who testified on the subject are not all agreed as to what would be reasonable compensation for a manager and assistant managers under circumstances such as those surrounding the Club Stables Company, Limited, we find, upon all the evidence thus far adduced, that the salaries allowed to the three respondents are exorbitant and excessive.

Directors stand towards the corporation which they represent and act for in the relation of trustees to a *cestui que trust*. Some of the authorities go to the extent of holding that they may not, lawfully, vote to themselves compensation for services and that any such attempted vote would be illegal, but it is unnecessary

to go to that extent in the case at bar. We will assume for the purposes of this appeal that if directors do vote to themselves salaries or other compensation, such salaries may be allowed to stand if their entire reasonableness and fairness is shown by the parties benefitted thereby but not otherwise, and a rule more favorable than this the respondents cannot expect. Directors can no more use the property of their principal for their own private gain than any other agent or trustee. They must act in good faith and for the interests of the stockholders whom they represent. See, generally, 1 Morawetz, Priv. Corporations, §508; *Schoening v. Schwenk*, 112 Ia. 737; *McNulta v. Bank*, 164 Ill. 448; *Gardner v. Butler*, 30 N. J. Eq., 702, 712, 722, 725; *Wayne Pike Co. v. Hammons*, 129 Ind. 376, 377; *Harris v. Agricultural Works*, 43 S. W. 869, 871; *Hedges v. Paquett*, 3 Or. 81; *Butts v. Wood*, 37 N. Y. 317, 318, 319; *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131. Not only have the respondents failed to show the entire fairness and reasonableness of the salaries, but the showing thus far is that the salaries are unfair to the corporation.

The fact that the manager's salary was first fixed, in November, 1901, without the aid of his vote, and that the salaries of the foremen were first fixed by the manager acting as such and not by the directors, does not take this case out of the rule, at least so far as the salaries paid subsequent to August 5, 1902, are concerned. See *Mallory v. Mallory Wheeler Co.*, *supra*. At the meeting held on that day, all three salaries would have been reduced but for the votes of the three respondents and they were continued at the excessive figures by virtue only of those votes. Again in December, 1902, it was the respondents C. H. Bellina and W. E. Bellina aided by one other director, who voted to continue the salaries at the old rate and to refuse to institute proceedings on behalf of the corporation.

As to the defense of laches we need only say, at this time, that upon the evidence thus far adduced that defense is not sustained as against either of the complainants in so far as the

excess of salaries received since August 5, 1902, is concerned. The bill prays for an injunction to restrain the payment of salaries *in future* as well as for the recovery of moneys already paid unlawfully. Whether or not any laches have been shown as to the moneys paid out prior to August 5, 1902, we need not now decide. It may be that further evidence will yet be adduced tending to throw light on that matter and if it is the court will then be in a better position to pass on the whole subject. Moreover it does not yet appear from the evidence that the complainant Bull had any knowledge of the transactions complained of prior to December 1, 1902, such as would bar his right to relief by reason of delay on his part to complain or to sue.

In our opinion, the motion to dismiss should have been denied and the respondents should have been required to present their defense. The decree appealed from is reversed and the case remanded to the Circuit Judge for such further proceedings as may be proper.

Robertson & Wilder for the complainants.

T. McCants Stewart for the respondents.

IN THE MATTER OF A. S. HUMPHREYS and FRANK
E. THOMPSON, Attorneys at Law.

ORIGINAL.

SUBMITTED JULY 10, 1903.

DECIDED AUGUST 10, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An attorney is not permitted to serve a new client against a former client in the same matter in which he represented his former client. If he does, the penalty will depend upon the circumstances. Ordinarily, it will be disbarment, but in this case it is made suspension for one year, in view of the circumstances—especially the looseness of the attorney's relations to his former client.

It is gross misconduct—meriting disbarment—for an attorney to attempt, by appeals to friendship and by threats and otherwise, to induce an opposing attorney to betray his, the latter's, client, an aged and weak-minded man, by advising him to consent to an unfair proposal of compromise and the taking of extortionate fees.

OPINION OF THE COURT BY FREAR, C.J. . .

(Galbraith, J., dissenting.)

This proceeding is an episode of the Sumner litigation, long since become notorious, and more particularly of what is known as the Ropert case in that litigation, recently decided by this court, *ante* 76. In that case the court was requested by Messrs. Humphreys, Thompson & Watson, attorneys in the case, to investigate the conduct of counsel on both sides, such conduct having been questioned. The court thereupon, with the acquiescence of opposing counsel, Mr. J. A. Magoon and Mr. G. A. Davis, took the usual course of referring the matter to the Attorney General for investigation and such further action as to him should seem advisable. The result was the institution by him of these proceedings for the disbarment or suspension of the respondents or other dealing with them.

Most of the proceedings in the Sumner litigation are set forth in the decision just mentioned. This is true also of some of the facts and conclusions which are involved in the present case, and for this reason there may be less fullness in the present decision than might otherwise be required.

There have been two periods in that litigation. The first period covered the years 1895-8 and included cases for the cancellation of a power of attorney and the appointment of a receiver, for the cancellation of certain conveyances and finally for the appointment of a guardian over John K. Sumner as an insane person. The guardianship case was discontinued upon the execution of a trust deed by Sumner to Bishop Ropert of the Roman Catholic Church, which deed also referred to a will made

by Sumner. The terms of the deed and will are set forth in the decision above referred to. The greater part of the property covered by the deed and will was an undividd half interest, of questioned title, in certain land bordering on the harbor of Honolulu, which Sumner had previously leased to the Oahu Railway and Land Company for 99 years and for the purchase of which for \$100,000 he had given an option to the company in the lease.

The second period of litigation—the one in which we are now chiefly interested—was begun August 4, 1902, by the bringing of a suit by the railroad company against Sumner and his trustee, the Bishop, for the specific enforcement of the option. On September 4, 1902, Mrs. Maria S. Davis, Sumner's sister, brought proceedings for placing him under guardianship and also a suit to cancel the trust deed and the lease and enjoin the execution of the option. All these three suits were settled October 13, 1902, by the discontinuance of the railroad suit, the withdrawal of the appeal from the decree dismissing the bill in the injunction suit, the entering of a decree dismissing the petition and declaring Sumner sane in the guardianship suit, the execution of a deed of the property in question, together with a certain small tract which had been reserved in the lease, to the railroad company for \$110,000, and by the distribution of that sum as follows: \$10,000 each to Sumner's grand-nephews and grand-niece, W. S. Ellis, J. S. Ellis and Mrs. Buffandeau, to Maria S. Davis and the Bishop, \$10,500 to the various attorneys (one of the attorneys having previously received a retainer of \$500), \$1,000 to one Catheart, a friend of Sumner, and \$475 for stamps on the deed, leaving \$48,025, which Sumner shortly after withdrew for himself. On October 27, 1902, the Bishop brought a suit in form for his discharge as trustee and the appointment of a successor, but the substantial issue in which was between certain of the defendants, namely, Sumner on one side, and the Ellises and Mrs. Buffandeau

on the other, as to whether the trust had terminated or not, that is, whether Sumner was entitled to the \$48,025 or not. This last mentioned suit is referred to as the Ropert case and is the one in which the decision above mentioned was filed. •

The charges against each of these respondents are in general of "professional improprieties, malpractice, deceit and infidelity to his client, and gross misconduct", and more particularly (in substance, without setting forth the details of the complaint,) that they acted as attorneys for Sumner in the railroad and guardianship cases, and knew that all claims of the Ellises (including Mrs. Buffandeau, née Ellis) to the proceeds of the sale had been disposed of in the settlement referred to, but that nevertheless soon after such settlement and especially in the Ropert case they acted as attorneys for the Ellises in opposition to the interests of their former client, Sumner. A further charge is made against the respondent Humphreys, to the effect that, while acting as such attorney for the Ellises, he proposed to J. A. Magoon, as attorney for Sumner, that he, Magoon, should betray the interests of his client, Sumner, and induce him to submit to a further and extortionate demand on the said funds by the Ellises and that said Humphreys and Magoon should each demand and take an unreasonably large fee therefor, and threatened that unless his proposal was accepted he would prevent by the use of legal process said Sumner from exercising any control over said funds during the rest of his, Sumner's, life.

These are grave charges. Considering the nature of proceedings of this character and the possible results to persons who have attained admission and perhaps prominence at the bar only after years of study and training and experience, and who and whose families may be largely dependent for their means of livelihood upon the exercise of their privileges as members of the profession, it goes without saying that the court should act in cases of this kind with unusual caution both in weighing the

evidence and in determining the penalty, and such is the course laid down in the books. And yet, however disagreeable the function of passing upon the alleged wrongful conduct of a member of a noble profession, the court, as likewise laid down in the books, has a responsibility in the matter and cannot shirk its duty. The nobler the profession the greater the care that should be observed in keeping its practice unsullied. In *United States v. Costen*, 38 Fed. 24, Mr. Justice Brewer, of the United States Supreme Court, then Circuit Judge, in disbarring an attorney for merely seeking employment on one side after his employment had ceased on the other and suggesting that he had in his possession important facts, said: "Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do,—things that in and of themselves may perhaps be criticised or condemned when done in obedience to the interest or supposed interest of his own client, and when he is seeking simply to protect and uphold those interests. If he goes beyond, perhaps, the limits of propriety, I can tolerate and pass that by; but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession." In the case of *Boone*, 83 Fed. 944, the United States Circuit Court of Appeals for the Ninth Circuit, in disbarring an attorney who, as in the *Costen* case, had intimated that he might be open to employment on one side, after his employment on the other had ceased, and suggested that he was in possession of important

facts, but who also had obtained a general release from his former client from all obligations arising out of his employment, and who claimed to have withdrawn from such employment from a sense of duty because he had discovered fraud in the case and not to have charged for the services he had rendered, and who claimed that he intended not to disclose the information he had but merely to use it in cross-examination of witnesses, &c., said: "It is the general and well-settled rule that an attorney who has acted as such for one side cannot render services professionally in the same case to the other side, nor, in any event, whether it be in the same case or not, can he assume a position hostile to his client, and one inimical to the very interests he was engaged to protect; and it makes no difference, in this respect, whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues." Realizing our duty to the respondents on the one hand and to the profession and the public on the other, we have, after hearing the evidence at the trial and observing the witnesses, read over all of the 573 pages of testimony and numerous documents introduced and considered them with the utmost care, but after making all due allowances on the side of caution and leniency we are constrained by the force of facts to find the respondents guilty of the charges in part at least.

The first question naturally is, what were the relations between the respondents and Sumner in the litigation up to the time of the settlement and what in the subsequent proceedings. There is no question as to the latter. The respondents, especially Mr. Humphreys, acting for the Ellises, took active steps the very day after Sumner withdrew the \$48,025, to prevent his keeping it, and in consequence of their action the Bishop brought suit, out of abundant caution, as we believe, to obtain the opinion of the court as to the propriety of his payment of the money to Sumner, and throughout that case the respondents, especially Mr. Humphreys, representing the Ellises, fought against Sum-

ner's interests not only with all their strength but with marked acrimony. There was nothing improper in itself in their ardent struggle for the Ellises in that suit. Although the case was decided against them on the ground that the trust deed was revocable and had been revoked, yet, as the court assumed, the deed was *prima facie* irrevocable, and it was only in view of extraneous evidence taken in connection with the terms of the deed that the court was led to its conclusion, and as to whether such extraneous evidence was sufficient the court was divided. That was not a frivolous suit by any means. The conduct of the respondents, though subject to criticism in several other respects, was improper, if at all, in that case, so far as the charge now under consideration is concerned, because of their relations to Sumner in the prior litigation. Their contention is that in that prior litigation they represented the Ellises alone (including Mrs. Buffandeau), and not Sumner at all. Although they appeared as Mr. Sumner's attorneys, they contend that it was with the distinct understanding that they represented only the Ellises. It may be that they could properly appear nominally for Sumner and really for the Ellises if that were clearly understood, although, as Mr. Humphreys now concedes, it might be unwise to do so for various reasons, especially under some circumstances, but whether, if they did so, they could afterwards properly appear against him in respect of the same matter might be a question. In our opinion, however, the evidence shows that their relations to Sumner in the earlier litigation was closer than that. Nor is it, on the other hand, because of their conduct or relations toward Sumner in the earlier litigation that they are now charged, although, assuming that, as they contend, they were employed to protect the interests of the Ellises alone as supposed beneficiaries under the trust deed, they were in our opinion, guilty of great recklessness in assisting and participating in the distribution of the trust fund without so much as looking at the trust deed or the will to ascertain whether their

terms permitted such distribution, which terms, as the respondents afterwards contended and as the court held in the Roper case, did not permit of a distribution even with the consent of all the persons who acquiesced therein. They not only did not take proper precautions in view of the fact that the fund was a trust fund in which others were interested, but they did not with a view to the rights or interests of their own acknowledged clients, if their own statements are true. The gravamen of the charge is that they acted first for Sumner and then against him in respect of the same matter, even if their actions in either capacity alone would be above criticism. There being no dispute as to their appearance against Sumner in the later proceedings, the main question is as to what were their relations to him in the earlier. The facts tending to show what those relations were are substantially as follows:

On the 5th of August, 1902, the day on which service was made on the Bishop in the railroad case, the three Ellises called at the chambers of the respondent Humphreys, then a Circuit Judge, to ascertain if he would act as attorney in that case. Judge Humphreys said that he could not, because he was on the bench, and recommended to them Mr. Henry E. Highton, and, they acquiescing, he arranged an interview between them and Highton for the next morning at his chambers. At that interview they engaged Highton for a retainer of \$500 and a fee of \$2,000 additional. The Ellises were not parties to the suit, but on the day, the 20th of that month, that their uncle, Mr. Sumner, who was a party, arrived from Tahiti, they took him to Highton and he, Sumner, then confirmed the arrangement they had made with Highton, paying the retainer and agreeing to pay the fee. Thereafter Mr. Highton acted primarily for Mr. Sumner, but in a more general sense represented the Ellises also.

While still on the bench, Judge Humphreys told his brother-in-law Mr. Magoon, that he, Humphreys, could come into the case after he left the bench and asked Magoon's opinion as to

the propriety of his doing so—in view of the fact that the case had been begun in his court, the bill having been addressed to him as First Judge of that Circuit Court. They talked the matter over quite generally. According to Magoon, Humphreys said that the case could be continued from time to time until he left the bench and then he could decide whether to go into it. They talked of Sumner's interests only. After Judge Humphreys left the bench, which he did at the end of that month, he told Magoon that he had been called into the case. When Humphreys left the bench, Highton, who had been told by the Ellises that Humphreys was expected to come in, went to Humphreys and offered him half of his fee if he wished to come in. Humphreys declined, saying that he would attend to his own fee, if he came in.

On the 4th of September, Sumner having insisted on a settlement of the railroad case, and having decided upon a disposition of the proceeds of the land that was to be conveyed, including the placing in trust of the greater part of those proceeds for the Ellises, they were all at Highton's office to arrange the settlement, when W. S. Ellis telephoned for Mr. Humphreys. The latter came and objected to the proposed terms of the trust deed, principally on the grounds that the trustee was not to be under bond and was to receive too large a compensation. The result was that the proposed settlement fell through and was never resurrected. It was at that meeting that Humphreys, Thompson & Watson, who had formed a partnership the day Humphreys left the bench, were retained. There is some dispute as to the nature of the arrangement. According to Humphreys, he came to the meeting as representing W. S. Ellis and was there retained by all three Ellises. During the meeting W. S. Ellis asked Humphreys what his fee would be, to which the latter replied, "the same as Highton's." Apparently comparatively little was said upon the matter. Much seems to have been taken for granted in view of previous understandings and the relations between the parties. Mr. Humphreys says that he was

retained by the three Ellises, but that he expected his fee to come out of the fund. The Ellises, whose testimony on this point was repudiated by Mr. Humphreys, whose witnesses they were, say they themselves were to pay the fee. That their testimony on this point was false was apparent even without Mr. Humphreys' repudiation. Mr. Highton says in substance that while the arrangement was made principally by the Ellises it was acquiesced in or confirmed by Mr. Sumner, and that Sumner agreed to pay the fee. Mr. Sumner says Humphreys, Thompson & Watson as well as Highton were his attorneys, but it is unnecessary to rely on his testimony. There is no doubt as to Mr. Highton's understanding, and that was that the firm of Humphreys, Thompson & Watson were then engaged by the Ellises and Sumner together, although particularly at the request or desire of the Ellises. This arrangement is just what might be expected in the light of the circumstances and the relations of the parties and harmonizes with the subsequent acts of all parties.

At that time Sumner and the Ellises were exceedingly friendly. He was then living with Mrs. Buffandeau, who had taken him to her house the day he arrived. She had held his power of attorney for a long time and received from the Bishop for Sumner the latter's entire net income from the property under the trust. They were constantly the recipients of his bounty—to a lavish extent. At that meeting he proposed to give them \$75,000. He had wanted to adopt them when he was here the year before. They were practically one family. They had engaged Mr. Highton precisely as they had proposed to engage Mr. Humphreys. They did so in a general way and in their own names, as Sumner was not here. But they understood that it was really for Sumner that they were acting, for they took him to Highton the day he arrived and, as they expected, he at once followed their advice, ratified all that they had done, paid the retainer, agreed to pay the fee, and accepted Highton as his attorney, though he had never seen nor heard of him before. As

W. S. Ellis testified, they had not expected to pay the fee though they had promised to do so. Their uncle was credulous and easily influenced as well as fond and generous. They evidently had had no doubt that he would ratify Humphreys' employment if they could have retained him instead of Highton. At the meeting when Humphreys was retained, Sumner was present; there was then no occasion for the Ellises to retain Humphreys on their own account alone. They had been friendly with him for several years and W. S. Ellis had been a bailiff of his court for a long time. They had complete confidence in him and wanted him, and it was only natural that they should expect their uncle to acquiesce in their wishes and engage Humphreys. They were scarcely able themselves to pay the fee. It is certainly not at all improbable that, as Mr. Highton puts it, Sumner, though unwilling to have personal relations with Mr. Humphreys, on account of certain past difficulties between them, was perfectly willing, in view of the desire of the Ellises, to have him retained to assist in the case, and that he was retained for all but more particularly for the Ellises and perhaps more particularly still for W. S. Ellis. While Mr. Highton acted as leading counsel throughout until the settlement, and both Sumner and the Ellises were satisfied with him, yet on important occasions, as at each of the two proposed settlements, they each wished to have present some one in whom they had special confidence. The Ellises wanted Humphreys or Thompson and Sumner wanted his friend Cathcart.

Now as to the subsequent acts. After that meeting, Highton and Humphreys went together to see the Bishop and then to the attorneys for the railroad company to see if they could not induce the latter to give a few thousand more than the two thousand five hundred dollars that the company was then willing to give for the tract that had been reserved in the lease. This, of course, in addition to the \$100,000 called for in the option for the rest of the property. On returning to his office Mr. Humphreys told Mr. Thompson what had occurred.

That evening the guardianship and injunction suits were begun. The papers were served on Sumner at the house of Mrs. Buffandeau, and were taken by Mr. Buffandeau or Sumner to Mr. Highton. The next day Mr. Highton took the papers to the office of Humphreys, Thompson & Watson, and informed Mr. Humphreys of the new developments. Some conversation was had in which Mr. Humphreys said, among other things, that owing to other engrossing engagements he could not give his personal attention to the cases and moreover that owing to the feeling between him and Sumner, he did not care to. He referred particularly to some differences he and Sumner had had several years before and to Sumner's having snubbed him on the street that day. Mr. Humphreys, however, said that Mr. Thompson (of their firm) would act in the case. Humphreys and Thompson contend that this was with the distinct understanding that Mr. Thompson should, as representing the Ellises alone, merely assist Mr. Highton because the Ellises might be interested indirectly, and because Mr. Highton had been here only a short time and had not become familiar with the local practice. Highton denies that there was any such understanding or any "segregation between services in the guardianship case and general services involved in the whole litigation." That day Mr. Highton prepared the answer in the guardianship case. There is some dispute as to whether it was typewritten in the office of Humphreys, Thompson & Watson. The respondents endeavored to show that it was not, but the only witness who was able to testify positively on the subject was Mr. Crook, then an attorney in their office. He, produced by the respondents, testified that the answer was typewritten there. that he had previously read it in Highton's office, and that Thompson had helped decipher a portion of it in their office, their typewriter having found some difficulty in reading Mr. Highton's writing. The next day, September 6, the answer was filed. The signature of counsel thereto is "Henry E. Highton, Humphreys, Thompson & Watson, attorneys and counsel for re-

spondent, John K. Sumner," the words "Humphreys, Thompson & Watson" being in Thompson's writing. Mr. Thompson says that he signed with the understanding that they were representing the Ellises and that he was to appear merely to assist Mr. Highton in the trial. On the same day a motion and a notice of the motion to set the case for hearing were filed, each signed "John K. Sumner, by Henry E. Highton, and Humphreys, Thompson & Watson, his attorneys," the words "Humphreys, Thompson & Watson" being in Thompson's writing. The hearing in that case extended over two weeks, the days of actual hearing being some eight or nine. Mr. Thompson was present every day, consulting with Highton, arguing questions of the admissibility of evidence, &c., to the court, and, to use his own language, "took a most active part, just as active as I could take." The clerk entered the names of Highton and Thompson as appearing for Sumner each day. Judge De Bolt, who tried the case, regarded Thompson as well as Highton as Sumner's attorney throughout. When the settlement was in progress, Mr. Davis, an attorney for the petitioner, and Mr. Thompson alone, without Mr. Highton, informed the Judge that probably the case would be settled. Later, Davis and Thompson presented to the Judge a form of decree dismissing the petition and declaring Sumner sane. The Judge had some doubts about signing a consent decree in such a case, but was ready to do so because he had come to the conclusion from the evidence that Sumner was sane. None of the attorneys who had appeared in the case being present except Davis on one side and Thompson on the other, some remark was made about both sides being represented. The Judge was given to understand that both sides were represented. The Judge then wished it to appear that the decree had not emanated from the court, and suggested that a motion or something else should be filed to show that it was a consent decree, whereupon the words "requested, approved and agreed upon before signing by his Honor" were written below the decree and just over the signa-

tures of all the counsel in the case, which were already there, the signature of "Humphreys, Thompson & Watson" as "counsel for John K. Sumner," being in Thompson's writing. In this Mr. Thompson acted for Sumner and held himself out to the Judge as Sumner's attorney in the absence of Mr. Highton. Mr. Thompson alone for the Sumner side conducted with the attorneys on the other side the negotiation that culminated in the settlement of the guardianship case. Those negotiations were quite active from Thursday, October 9, to Monday, October 13, the day of the settlement. The Ellises, it will be remembered were not parties to that suit, though it was believed that its result would affect them indirectly. Both Magoon and Davis, attorneys on the other side, as well as the Judge and Highton, with whom Thompson was associated, understood all through that Thompson represented Sumner as well as the Ellises. They so understood not only from Thompson's activity on behalf of Sumner in court, but from his words and actions during his negotiations with them, from his references to Sumner, his statements as to what Sumner was willing or unwilling to do, &c. Mr. Davis, it may be mentioned, was a witness for the respondents and apparently very reluctant to say anything against them, but he seemed to be pretty clear on this point. During those negotiations, on Thursday and Friday, Mr. Thompson informed Mr. Humphreys as to what was doing and consulted with him in regard to the matter. On Friday Mr. Humphreys left the city and was absent a week.

At the final settlement, the various sums, excepting those paid to Mrs. Davis and her attorneys, were paid by the Bishop on Sumner's order, contained in a letter specifying the amounts and persons in each instance. In this order Sumner directed the Bishop to pay to Humphreys, Thompson & Watson \$2,500. The Bishop paid this amount to Thompson under this order and the latter gave a receipt as follows: "Honolulu, H. I., Oct. 14, 1902. Received from Rt. Rev. Gulstan F. Ropert, Trustee John K. Sumner, Twenty-five hundred Dollars, In full fee

professional service litigation between Oahu Ry. & Land Co. and John K. Sumner; and re proceedings to appoint guardian instituted by Maria S. Davis; and directed to be paid by letter of John K. Sumner. \$2500. Humphreys, Thompson & Watson." This receipt was on a printed blank, the written part and signature being in Thompson's writing. Thus he acknowledged that he was paid for services in the guardianship case and by Sumner. So far as appears, no arrangement whatever had ever been made with the Ellises in regard to Humphreys, Thompson & Watson's appearing in the guardianship case,—except their general retainer above referred to, which was before the guardianship suit was begun. The list of payments which Sumner directed the Bishop to make was made up by Highton. There was not a word said, so far as appears, in all the negotiations for settlement about Sumner's paying for the Ellises the fee of Humphreys, Thompson & Watson. It seems to have been taken for granted all along that Sumner was to pay that fee—and not as part of what was to be paid to or on account of the Ellises. There was nothing to show that any arrangement was made for the payment of a fee on behalf of the Ellises as part of the settlement, different from the original understanding as to the payment of that fee. In regard to the fee of the attorneys for Mrs. Davis, the situation was different. They endeavored to get Sumner to pay that, but Sumner declined, at least so Thompson represented to opposing counsel, and those attorneys then got the railroad company to pay \$5000 additional to what had already been agreed on between it and Sumner,—apparently on the strength of the refusal of Mrs. Davis' attorneys, or one of them, to consent to a settlement of the guardianship case unless their fee was paid. That fee was paid, with the \$10,000 to Mrs. Davis, separately, and was regarded in a different light from the fee paid to Humphreys, Thompson & Watson. The latter was regarded in the same light as that paid to Highton.

There are several other matters bearing on the question of the relation sustained by the respondents to Sumner and the Ellises separately. Some of those relied on by the respondents will be referred to. At the meeting at which the respondents were retained, Humphreys said that as representing W. S. Ellis he objected to the proposed trust deed. From that it is argued that he was not attorney for Mr. Sumner. The inference goes too far. The same reasoning would show also that Humphreys did not represent the other Ellises, which of course, is contrary to fact. The true explanation seems to be that at that stage Humphreys did represent only W. S. Ellis, for he was called in by him alone, but after the matter of the proposed trust deed was disposed of, Humphreys made arrangements according to his own statement, with all three Ellises, and, according to Highton, with Sumner also. Again, on the first day of the hearing in the guardianship case, according to two of the Ellises, Highton asked them where Thompson was, and, upon their replying that they did not know, said, "Well, he is representing you Ellises and I want him here." If that is what was said, it does not go very far. Highton no doubt understood then, as he wrote a little later and says now, that Humphreys, Thompson & Watson more particularly represented the Ellises. If his remark implied that Thompson did not represent Sumner, it equally implied that Highton himself did not represent the Ellises, which, of course, was contrary to fact. The inference goes too far for the purposes of the respondents. At best an off-hand remark like that, if it were made, would not under the circumstances overcome other evidence of a much weightier sort. Again, at the final settlement, Highton, who had objected to the settlement of the guardianship case and the payment of \$10,000 to Mrs. Davis, because he believed it a case of blackmail, still insisted that it could be carried out only against his advice and said that he would yield only to Mr. Sumner's insistence on the settlement. Thompson then asked Highton whom he represented, to which Highton replied that he represented John K.

Sumner. Thompson replied that Highton seemed to forget that he was employed by the Ellises as well. Highton replied that in these proceedings he represented John K. Sumner, whereupon Thompson replied, "repeating the words parrot-like," as he says, that in these proceedings he represented the Ellises and insisted upon the settlement of the guardianship case and the payment of the \$10,000 to Mrs. Davis. They were "hot", as Thompson says. Thompson's reply was somewhat of a play on words. Under the circumstances the language may easily be explained without the necessity of holding that Thompson represented the Ellises alone. The inference here also goes too far. If these words show that Thompson did not represent Sumner, they show also that Highton did not represent the Ellises, which is contrary to fact, as shown beyond question not only by the testimony of Highton and the Ellises at the present time, but by their statements made in writing at that time, as well as by the testimony of Mr. Thompson in the present case. Again, Thompson makes considerable of the fact that he was not present as a rule at the conferences outside of court between Highton, Sumner and the Ellises. If that shows that he was not attorney for Sumner, it shows likewise that he was not for the Ellises, which is contrary to fact. As matter of fact he was present with the others in court every day, he took part in at least two conferences outside of court when all were present, and Highton often went to his office to consult him. Humphreys, of course, had nothing to do with Sumner during the entire proceedings, but that was the understanding, and, so far as appears, he had nothing to do with the Ellises either. After the first day, his part seems to have been confined to consultations with Thompson.

There was no doubt that it was understood by all that Humphreys, Thompson & Watson represented the Ellises more particularly and perhaps W. S. Ellis more particularly still, and there is no doubt that Humphreys and Sumner personally felt hostile to each other. We may concede that they did not consider that their relations with Sumner were fully all that

are usually supposed to exist between attorney and client. There are all degrees of closeness in the relationship of attorney and client. It is clear that in this case the relationship of the respondents to Sumner were such as to make it improper for them to take sides against him in immediately subsequent proceedings respecting the same matter. If their relationship were that of attorney and client to its fullest extent, there could be but one conclusion, as stated by Mr. Humphreys at the hearing—that of disbarment. Under the circumstances, something short of that would be sufficient. What the penalty should be will depend to some extent upon the nature of the settlement. In our opinion it is an aggravating circumstance that the respondents knew or ought to have known that the settlement was understood to be in full and that Sumner was to have the remaining \$48,025 absolutely. For the respondents to take a position against Sumner afterwards in opposition to that understanding shows greater disregard of the requirements of professional ethics. That that was the understanding is evident from the following:

There was some difference of opinion among the members of this court in the Ropert case as to the bearing of the evidence in regard to the understanding at the time of the settlement upon the question of the revocability of the trust deed. That question is not now involved. There is also much evidence in this case upon that point that was not in that case. We have now to consider merely what the understanding of the parties was at the time of the settlement and more particularly what Sumner's understanding was, and how far the respondents knew or ought to have known that. The theories of the respondents as to that understanding, as well as upon some other points, have been so varied and shifting that it is difficult to treat of them in a satisfactory manner. They seem to have two principal theories in regard to the settlement. The one chiefly relied on is that the balance of the money, \$48,025, was to remain subject to the trust by express understanding or agreement. The only direct evidence adduced in support of this, in

either the Ropert case or this case, is that, as contended, at the final settlement Mr. Buffandeau asked Sumner what he was going to do with the rest of the money, and that Sumner replied "the Bishop is still my trustee, you will get it when I die," and that then Thompson jumped up and said "that is all we want to know; children, sign the deed." As was stated in the opinion in the Ropert case there was such conflict in the evidence as to just what was said. It was pointed out there that, as shown by all the evidence on that point, the question was one of mere idle curiosity asked by one who had no interest or claim whatever, that the reply was made in anger by Mr. Sumner, who had become wearied with the importunities of the Ellises for "more," and that the question itself implied that Sumner could do as he pleased with the rest of the money. The evidence in the present case is stronger against the respondents' contention. All agree as to the question asked by Buffandeau. Now, also, it seems to be generally agreed that Sumner's answer at first was "none of your business," although Sumner alone testified to that in the Ropert case. Upon Buffandeau's saying further that they wanted to know before they signed, it is generally agreed that Sumner said, "the Bishop is my trustee," which, of course, was perfectly true, for the Bishop remained his trustee for a week longer before he decided to draw his money, but it seems to be pretty evident that he did not say "you will get the money when I die," and it is probable that Thompson did not say "that is all we want to know" and doubtful if he said "children, sign the deed." The respondents' star witness, Mr. Cathcart, says "the matter stopped right there * * * * Mr. Buffandeau smiled and it stopped abruptly," that is, after Sumner's reply, and that he does not "recollect Mr. Thompson saying anything." Not only could the question and answer not be held to show the understanding contended for, considering the circumstances; not only does it imply the contrary, but the contention that the Ellises signed the deed only on that alleged assurance of Sumner that the rest of the money would remain subject to the

trust is simply ridiculous. According to all the witnesses (the Ellises and Thompson included) Sumner, the Ellises and Thompson were all insisting on the settlement including the execution of the deed to the railroad company, against Highton, who persisted in his position that the part of the settlement relating to the guardianship case could be carried out only against his advice. The deed was already prepared. All were ready enough to sign, according to the direct testimony. That part had been settled. Thompson was called to the meeting by Buffandeau only because of objections to the compromise of the guardianship case. Furthermore, Buffandeau's question was not asked until after even Highton had yielded to Sumner's wishes and Sumner and the two Davises had already signed. In this connection reference may be made to the testimony of Mr. Watson, respondents' witness, to the effect that immediately after the settlement Thompson told him about it and said that the rest of the money was to remain subject to the trust. This is relied on to show Thompson's understanding at the time. But it is noticeable that Thompson's reason then given for that conclusion, as stated by Mr. Watson, was not that there was an agreement to that effect, but merely, as a conclusion of law, that the proceeds would be subject to the trust because they stood in the place of the property. That reason would, of course, require all the proceeds, if any, to remain subject to the trust. But the point to be made now in connection with Buffandeau's question is that it likewise appears from Watson's testimony that Thompson said the same thing to him before going to the meeting at which Buffandeau asked his question, in other words the question and answer made no difference in Thompson's estimation at the time.

Respondents rely also on the fact that the Davises were required to sign a release or agreement to release, and that the Ellises were not required to do so. This release now appears to have been suggested by Mr. Humphreys and not by the Ellises. The respondents' neglect to get releases from the Ellises as well as from the Davises for their client Sumner, is made one

of the grounds of complaint in the information in this case. But while doubtless that would have been a wise course to pursue and there is some testimony by one of respondents' witnesses to the effect that Sumner afterwards complained that that was not done, and two of the witnesses against the respondents testify that Thompson, when procuring the signatures of Mrs. Davis and her son, R. W. Davis, told them that the Ellises were to sign similar releases, we do not find the respondents guilty as to that. No such releases were contemplated. The distribution was made on the theory that the money was Sumner's and that no releases were needed. This point was disposed of in the Ropert case. One or two observations may be added, however. The evidence (on both sides) in the present case seems to show that so far as Sumner and Mrs. Davis were concerned (as distinguished from their attorneys) Mrs. Davis was acting in good faith in bringing the guardianship suit and was willing to discontinue that suit, if Sumner so desired, whether she received any money or not, and that it was not only Sumner's proposition to pay her \$10,000 as a gift as well as to pay \$10,000 to the Bishop and each of the Ellises as gifts, but that it was his purpose, as he insisted at the time, to treat them all alike. On the day of the settlement he left the Ellises and went to live at Mrs. Davis', where he has been ever since. Digressing now for a moment to the question of the relation of attorney and client we may, while on the subject of the release, refer to a contention, perhaps hardly more than suggested, by the respondents, to the effect that the fact that the release was prepared by them and retained by them and afterwards turned over to the Ellises shows that they were attorneys for the Ellises alone. It does not appear when it was turned over to the Ellises, but the facts connected with the release no doubt do tend to support the respondents' theory to a certain extent, assuming of course, that they were not then acting with duplicity—which we do not hold. And yet those facts can at best hardly outweigh other facts of less doubtful purport. It was only natural to get a release from the Davises, as they were at

least technically hostile to Sumner and actually so to the Ellises while the Ellises were supposed to be friendly to Sumner, and the respondents were attorneys for the Ellises as against the Davises. Moreover the release was not to the Ellises. It was to Sumner and such persons as he should name. From that the inference, as far as it goes, which is not very far, is that the respondents were Sumner's attorneys. The fact that they kept the release may be accounted for on the theory that they were his as well as on the theory that they were the Ellises' attorneys, though we think that they kept it as more particularly representing the Ellises. The fact that they gave it to the Ellises, if that is a fact, is of little significance if, as was apparently the fact, that was after they and the Ellises had taken sides against Sumner.

Now, returning to the question as to the understanding at the settlement, the other of the respondents' two principal theories seems to be that the balance of the money remained subject to the trust as matter of law, because of the absence of an agreement to distribute it. They perhaps go a little further by attempting to maintain that the distribution of a part of the entire fund was a matter of definite contract made with reference to the Ellises' supposed interests as beneficiaries under the trust, and that the Ellises consented to accede to Sumner's wish to give Mrs. Davis and the Bishop each \$10,000 out of the common fund and to sign the deed to the railroad company in consideration of Sumner's consenting to their withdrawing \$10,000 apiece from the fund. (They say nothing about the \$1,000 given to Sumner's friend, Cathcart.) The difficulty with this is that it is a mere hypothesis with nothing in the evidence to support it, other than the fact that, in view of the terms of the trust deed, there was considerable ground on which to have proceeded on such a theory, if the Ellises and their attorneys had attempted to do so. There was no talk whatever of the respective interests of the Ellises and Sumner under the trust. Neither the Ellises nor their attorneys so much as thought of examining the trust deed to see what the

interests, if any, of the Ellises thereunder were. One of the respondents' strongest points in the present case is that they did not know the terms of the trust deed or will or the interests of the various parties thereunder. Mr. Highton, who alone of all the attorneys examined the trust deed and will, took the position within a few weeks after he was retained and held it consistently thereafter, as shown by his acts done and words written at the time, that the entire fund was Sumner's and that whatever others should receive would be by way of gift from him. It is true, the railroad company, warned, by all the previous Sumner litigation, of the disposition of his relatives to question his acts, insisted that they all, including the Davises, who were supposed to have no interest under the trust, should join in the deed, and there is some evidence tending to show that the Ellises made use of this as well as the influence they had over him to force Sumner to give them more than \$10,000 each, but there is nothing whatever to show that they ever during those negotiations acted on the theory that the payments were in the nature of a partial distribution, by way of mutual consideration or contract, of funds held in common. Their testimony all through is that Sumner wished to give them \$10,000 apiece, &c. Mr. Highton regarded these payments to the Ellises as purely voluntary gifts by Sumner to his relatives, arranged between themselves as a family matter, and that they had no legal connection with the settlement. Mr. Humphreys now goes so far as to say that, in his opinion his firm should return the \$2,500 received by them at the settlement and the \$1,000 afterwards received as their fee from the Ellises in the Ropert case, because they were culpably negligent in not securing the balance of the money for them by a new trust deed, but, although he contends that he was employed by the Ellises chiefly in the matter of a proposed new trust deed, neither he nor Thompson suggested such a deed at the time of the settlement, although Thompson consulted with Humphreys on the Thursday and Friday before and told him what it was

proposed to do and Humphreys suggested getting a release from the Davises. It may be added, in passing that Mr. Humphreys says that he had intended to return the fees but had not intimated that intention to any one before because he did not have the money, though he also says that his firm was doing a business of \$45,000 a year. Mr. Thompson on the other hand contends that his firm earned its fees because it was through their efforts that the Ellises secured \$30,000 from Sumner, but all the evidence on both sides shows that Sumner proposed himself to give them that sum and insisted on doing so. The respondents may have been entitled to their fee under their contract, but not because they secured \$30,000 for the Ellises. It will hardly be necessary to point out further oral evidence or to refer to the acts of the parties to any extent, in addition to what was said on this point in the Ropert decision, as to the understanding at the settlement. Fortunately, we have now in evidence documents written at the time that leave no room for doubt. These throw some light on other points also, showing, for instance, among other things, that Mr. Highton's view as to the relations of the respondents to Sumner and the Ellises, is not a new invention on his part devised now as an act of revenge against the respondents for their abuse of him upon a recent occasion hereinafter referred to. The following letters between Highton and the Ellises and Sumner show what they thought at the time. An attempt was made to show that the Ellises did not understand them at the time, but they admitted that the letters were read over slowly to them by Highton before they signed (and they are intelligent people and understand English well) and further that one of them translated the first letter into Hawaiian in the presence of all of them though more especially for Sumner's benefit. They are also unable to say wherein they misunderstood the letters, and that is not strange since the statements therein are fully sustained by other evidence. There is one error in the first letter the word "eighty" being written for "ninety" near the end of the letter.

"October 10th, 1902.

Oahu Railway & Land Co. vs. John K. Sumner and Bishop of Panopolis.

Guardianship of John K. Sumner, John K. Sumner, by his Next Friend, Maria S. Davis vs. Oahu Railway & Land Co. and Bishop of Panopolis.

John K. Sumner, Esquire, William S. Ellis, Esquire, John S. Ellis, Esquire, Mrs. Victoria Buffandeau.

My employment in the first case named above was originally for John S. Ellis, William S. Ellis and Victoria Buffandeau, and it was agreed that my fee should be \$2,500.00, of which \$500.00 constituting the retainer, has been paid. When Mr. John K. Sumner arrived, August 20th, 1902, it was further agreed that I should represent him, as he was and is the owner of the property involved and entitled to the proceeds thereof. I considered, however, that my employment necessarily embraced the other proceeding and suit above mentioned, and that for them no additional charge should be made. The amount to be paid to me, therefore, for the entire litigation, beyond what I have received, is Two Thousand Dollars.

When Judge Humphreys left the Bench, it was further agreed that he, which of course meant the firm of Humphreys, Thompson & Watson, should also be employed specifically in the guardianship case, and that his and their fee should be Two Thousand Five Hundred Dollars. While his and their employment was limited on the record to the guardianship case, it was understood to apply to the entire business, but more directly to the interests of William S. Ellis, John S. Ellis and Mrs. Victoria Buffandeau.

1. In the case of *Oahu Railway and Land Co. vs. John K. Sumner and the Bishop of Panopolis*, I have kept the time alive to move or plead on behalf of Sumner, and have also thoroughly prepared to file and support a demurrer to the bill of complaint.

2. The case of John K. Sumner, by his next friend, Maria S. Davis, on his motion, has been dismissed, and an appeal from the order taken to the Supreme Court of the Territory of Hawaii. In this case as in the first, I have done a great deal of work.

3. The guardianship case has been on trial for the greater part of two weeks, and all the proceedings, preliminary and on the trial, have received my personal and undivided attention, aided, as I have been, efficiently, by Mr. Thompson.

I wish it to be distinctly understood and acknowledged in writing by you that, at no time, have I recommended any settlement of this litigation. During my entire life, I have been, and I now am, uncompromisingly opposed to submission to illegal exactions. I believe John K. Sumner to be in every respect sane, competent and capable of managing his own property and attending to his own business, and this litigation, the objective point of which is to take money from him which is exclusively his own, in my opinion, is not to be justified in law or fact. Mr. Sumner, like other men, has a plain right to do as he pleases with his property or money, and I absolutely decline, in a professional capacity, to endorse any proposal which practically denies this right.

But on Thursday, October 9th, 1902, in the presence of the Right Reverend Gulstan F. Ropert, Bishop of Panopolis,—myself, Mr. Thompson, the Ellises, Mrs. Victoria Buffandeau, and John K. Sumner being in attendance,—it was definitely agreed that the entire litigation might be settled on the basis of \$105,000.00, to be paid by the Oahu Railway & Land Co., for the rights of John K. Sumner and his beneficiaries and relatives in the Quarantine Island property, and that of this amount, in addition to the fees above mentioned, Ten Thousand Dollars should be paid to Mrs. Maria S. Davis. The distribution of the remainder, which belongs to Mr. John K. Sumner, was and is to be settled between him, William S. Ellis, John S. Ellis, and Mrs. Victoria Buffandeau.

I am bound to obey the positive instructions of my clients, and, on this ground and no other, acting under their direction, will do my best to promote the suggested compromise. I now understand that the Oahu Railway and Land Co. proposes to pay \$110,000.00 for a conveyance from all the parties of their entire interest in the property in question, of which Five Thousand Dollars is to go to Messrs. George A. Davis and to Magoon and Lightfoot, attorneys for Maria S. Davis. The distribution of the entire sum of \$110,000.00, so far as settled, is to be as follows:

To Messrs. George A. Davis and Messrs. Magoon
and Lightfoot\$ 5,000.00
To Messrs. Humphreys, Thompson & Watson..... 2,500.00
To myself, embracing the whole litigation, and al-
lowing for retainer paid..... 2,000.00
To the Bishop of Panopolis..... 10,000.00

This leaves to be divided between John K. Sumner, William S. Ellis, John S. Ellis, and Mrs. Victoria Buffandeau, the sum of Eighty Thousand Five Hundred Dollars, as they may agree among themselves, Mr. Sumner being the owner of the money. They are to meet at this office at eleven o'clock a. m. tomorrow (Saturday), October 11th, 1902, to determine on the distribution, which is necessarily dependent upon the payment by the Oahu Railway & Land Co.

Faithfully yours,

HENRY E. HIGHTON."

"Honolulu, October 11, 1902.

"Dear sir:—We have read and thoroughly understand your letter to us, dated October 10th, 1902, in reference to the litigation about the Quarantine Island property and all property embraced in the lease and option (so-called) from John K. Sumner to the Oahu Railway and Land Co. The statements in the letter are, and each of them is, correct, and we add that you have in no way advised the compromise of the litigation, for which we hold ourselves entirely responsible, and request you to act under our instructions and, if possible, to consummate the settlement.

Yours truly,

JOHN K. SUMNER,
VICTORIA S. BUFFANDEAU,
WILLIAM SUMNER ELLIS,
JOHN S. ELLIS."

The next document is the letter from Sumner to the Bishop on which the latter paid out the money. No question was raised as to Sumner's right to make the order and no one suggested that the Ellises should join in the order as co-beneficiaries under the trust. This order shows what the Bishop as well as Sumner and Highton understood. It was drafted by Highton and signed by Sumner. Of the \$49,025 expressed

in the letter as remaining subject to Sumner's order, \$1,000 was paid to Messrs. Holmes & Stanley and Mr. Stewart, attorneys for the Bishop, leaving the \$48,025 so often referred to.

"Honolulu, T. H., 13th October, 1902.

"To The Right Reverend

GULSTAN F. ROPERT,

Bishop of Panopolis.

Right Reverend Sir:—Out of the sum of \$94,525 in your hands as my trustee on the settlement made with the Oahu Railway and Land Company, William S. Ellis, John S. Ellis, Victoria S. Buffandeau, Maria S. Davis, please pay by cheque at once, the following amounts, to the following persons:

Humphreys, Thompson & Watson.....	\$ 2,500.00
Henry E. Highton.....	2,000.00
R. W. Cathcart.....	1,000.00
William S .Ellis.....	10,000.00
Victoria S. Buffandeau.....	10,000.00
John S. Ellis.....	10,000.00
To yourself	10,000.00

\$45,500.00

This will leave in your hands altogether \$49,025 subject to my order.

Of the sum of \$110,000.00 constituting the full settlement, \$15,275 has already been accounted for—namely, \$5,000.00 to Davis and Magoon, attorneys; \$10,000.00 to Maria S. Davis, and \$475 constituting my proportion of the stamps on the deed to the Oahu Railway and Land Company.

Faithfully yours,

JOHN K. SUMNER."

The fact that there was an allegation in the Bishop's complaint in the Ropert case to the effect that it was understood that the balance of the money should remain subject to the trust is of little consequence as showing his previous understanding, as we considered in the Ropert case, in which that fact was called to our attention. The complaint was drafted by counsel and, if that allegation was particularly called to the Bishop's attention, he doubtless subscribed to it in reliance on

the representations made by the respondents and the Ellises and not on his own understanding, for he had both acted and said that he had acted on a different understanding in paying the money over to Sumner.

The next papers are the receipts given by the Ellises. These are in Thompson's writing, except the few words printed in the form and the signature by the Ellises. They tend to show what Thompson as well as the Ellises thought at the time. Two are in form as follows, signed by J. S. Ellis and Mrs. Buffandeau respectively: "Honolulu, H. I., Oct. 14th, 1902. Received from Rt. Rev. Gulstan Ropert, Trustee John K. Sumner, Ten Thousand Dollars, In full am't to be paid me under settlement between Oahu Ry. & Land Co. and John K. Sumner, and being am't directed to be paid by letter of J. K. Sumner, \$10,000." The other, signed by W. S. Ellis, differs only to a slight extent, reading after the word "dollars" as follows: "In full settlement between Oahu Ry. & Land Co. and John K. Sumner, and being directed to be paid me by letter of John K. Sumner." The fact that all at least except the respondents understood that the settlement was complete and final and that the rest of the money was subject to Sumner's pleasure, is established.

The question remains as to how far the respondents knew or ought to have known that fact. They claim that they did not know of the correspondence between Highton and Sumner and the Ellises and did not see Sumner's letter to the Bishop until long afterwards. We believe that they did not see the former letters until two months later and there is no evidence that they had heard of them earlier. Their clients, the Ellises, may not have told them. As to the letter from Sumner to the Bishop, we will assume that Thompson's statement is true that he did not see it at the time, although the receipts which he wrote refer to it, and Highton thinks he must have shown it to him. It is not unlikely that Thompson wrote the receipts, as he says, on Highton's statement that such a letter would be written, but that does not alter the fact that Thompson knew that the

money was to be paid on Sumner's order alone, as the reference in the receipt to Sumner's letter shows. The receipts also show that Thompson knew that the payments were "in full settlement," though there is perhaps some room for controversy as to what was considered fully settled. There are other specific things that tend to show that Thompson understood the theory on which the settlement was made. For instance, Sumner's answer in the guardianship case which was filed as early as September 6, and which was signed by Thompson as counsel for Sumner, and a portion of which he helped his typewriter decipher when in manuscript form, contains the following, referring particularly to the railroad suit and the proceeds of the sale: "and this respondent proposes to exercise his own judgment, and to act upon his own will, in the disposal of any fruits and avails of the said suit, if compromised, or of his property generally in said Territory." Thompson says that he thinks that he did not read this before signing it but he thinks that he may have read it without noticing this portion during the trial of the guardianship case, that is, before the settlement. Mr. Buffandeau's question referred to above as well as the form of the Davis release, drawn by the respondents, point the same way. But not to multiply specific instances, anyone of which might perhaps, standing alone, be explainable on some other theory, the fact remains that such was the understanding of all at least except Thompson, and is it reasonable to suppose that he, who has not been accused of dullness, could have been in the thick of the negotiations for compromise and not have understood what all the others understood? He was the only one who conducted the negotiations with the attorneys for Mrs. Davis. He and Humphreys both say that they discussed the matter of the settlement the Thursday and Friday before. He was present with all the others at the Bishop's on Friday when the matter was gone over there and he, of course, took part at the final meeting. Grant that he did not so understand, still, can there be any question that, especially considering his relations to Sumner, there was an abundance to put him upon inquiry

before taking sides against Sumner? See *In re Paakiki*, 6 Haw. 518. Even if he might be excused on the theory that there was not enough to put him on inquiry at the time, still the day after Sumner drew the balance of the money and before the Ropert suit was begun he was sent by Humphreys to the Bishop to ascertain the facts, and, according to his own testimony, the Bishop told him in substance that he assumed that the matter had the approval of everybody, and that he had paid the money to Sumner even in spite of the fact that Sumner's attorney, Magoon, had told him that he, Magoon, did not want him, the Bishop, to pay without first consulting his attorney, Mr. Stanley. Thompson returned to the office and told Humphreys. The latter then went to Magoon and learned what he and Sumner understood. Later, a week before the trial of the Ropert case, Humphreys asked Highton if he would testify for the Ellises, and Highton, according to Humphreys, told him that "he understood the settlement was a complete settlement and that the balance of the money belonged to Mr. Sumner," and gave Humphreys copies of the letters above set out between Highton and Sumner and the Ellises.

In closing the discussion on this branch of the case, already protracted far more than intended, reference must be made to the question of Mr. Highton's credibility. To judge from their arguments one would suppose that the respondents' chief defense was abuse of the other side, particularly the Attorney General who is prosecuting at the request of the court and as a result of investigations set in motion by the respondents themselves, and more particularly Mr. Highton and Mr. Magoon. The principal ground for attacking the credibility of these two witnesses seems to be in general that they must both have been moved to perjure themselves by way of revenge against the respondents because of shameful abuse heaped upon them by the respondents. They also endeavor to show that these witnesses falsified in certain particulars. Referring to Mr. Highton alone in connection with branch of the case, we may remark in gen-

eral that, in our opinion, the calumnies, for they are nothing short of that, hurled against Mr. Highton, are entirely without foundation, so far as has been made to appear. Unfortunately for the the respondents there is in this case a vast amount of evidence against them in addition to Mr. Highton's testimony. Unfortunately also for them, when there was indisputable corroborating evidence, it corroborated Mr. Highton as against the respondents. It might be sufficient to refer merely to the acts of the respondents themselves, already set forth at some length, as corroborating Mr. Highton's testimony. But the particular matters on which the respondents chiefly rely to show Mr. Highton's alleged incredibility will be mentioned. These are of a merely collateral nature. The respondents attempted to show that Mr. Highton falsified as to his earlier views and statements upon the question of the revocability of the trust deed. He testified that he did not remember having stated in his present office (into which he moved more than a month after he was retained) that the will was a part of the trust deed and that they were irrevocable. He testified also that he did not fully make up his mind on that question until two or three weeks after he was retained. The respondents then introduced Messrs. Stanley and Stewart, who had been attorneys for the Bishop, to show that Mr. Highton had made such statements to them, but they both testified merely that he made such statements within a few days only after he was retained, and he, taking the stand again, said that he may have done so within that time, though not as a final legal opinion. In the same connection another closely related matter may be mentioned. Mr. Humphreys took the position that certain views expressed on the fourth of September upon the question of the alleged invalidity of the option in the lease were his and not Mr. Highton's, as the latter seemed to imply, but the witnesses, Messrs. Stanley and Stewart, introduced by the respondents on the matter just mentioned, also went further of their own accord and stated that Mr. Highton soon after his retainer in August expressed these views in regard to the option. A more important

matter from some standpoints arose in connection with the letters between Highton and Sumner and the Ellises. The respondents, especially Mr. Humphreys, attempted to make the court believe that they first learned of those letters during the trial of the Ropert case and that on the first occasion after they saw those letters, Humphreys, in righteous indignation, called Highton a damned liar, scoundrel and fraud, and charged him with having got their clients, the Ellises, to sign the letter behind their, the respondents', backs. It may be said in passing that if anything is certain in this case from the evidence produced by the respondents as well as that of the prosecution it is that the Ellises were Mr. Highton's clients as well as the respondents' clients when they signed that letter. So much for Humphreys' charge against Highton on that occasion. But the more important point is that it was shown beyond dispute by entries made at the time by Highton in his diary, that he told Humphreys of those letters on the 18th of December, a week before the trial in the Ropert case began, and sent him copies of the same the next day, and that Humphreys did not empty his abuse upon him until the 12th of March following—a few days after the court requested the Attorney-General to investigate the conduct of counsel—and it was further shown that Humphreys spoke to Highton about the letters in a courteous, though complaining, way only a few days after he received copies of them in December, and that they, Highton and Humphreys, had had correspondence and personal interviews in an amicable way from that time until March 12. Highton's testimony and diary also show that the statements of the respondents as to what was said and done on that occasion on March 12 were false in certain particulars, as well as that their conduct on that occasion did not reflect any credit upon themselves. The respondents did not attempt to rebut Mr. Highton's testimony. Their abuse of him upon that occasion they rely upon as his incentive for falsely testifying against them, as they claim. According to Mr Highton they did not use as strong language as they say they did, but their conduct was such as to make him not care to have

anything to do with them thereafter. He went to their office, at their invitation in response to a telephone communication from him to them on other business, and Humphreys, who had previously told Thompson of his intention, called him, Thompson, in, and then, there being two young men against one elderly man, Humphreys told Highton that his conduct in connection with the letters was the greatest outrage in his professional experience, &c., but did not call him a liar, scoundrel or fraud in his hearing. But it will be unnecessary to prolong the discussion on this line. The least said, the better for the respondents. Fortunately for them we are not disposed to judge them by the standards by which they would have us judge others. It is a curious circumstance that practically every argument or charge aimed by them against opposing witnesses or counsel applies with double force against themselves.

What should the penalty be? As stated above, if the relation of attorney and client existed between the respondents and Sumner to its fullest extent, the penalty, by all the authorities, should be disbarment. Where there are mitigating circumstances, it may well be only suspension. How far the courts go will be illustrated by a few cases. In one case an attorney after the expiration of his term of office as attorney and counselor for the city and county of San Francisco accepted a retainer of \$100 from the attorney on the other side, not to accept employment from the city in certain cases. These cases were two of eight hundred cases pending when he took office. He knew nothing of their facts. They were pending and had been decided against the city in the lower court before he took office. He directed that appeals should be taken in all the cases as a matter of precaution. When he accepted the retainer after he left office, the two cases in question had been decided by the appellate court, affirming the judgments below. When he was offered the retainer, he said he had had nothing to do with the cases and knew nothing of them and had not been employed by the city and thought he was in a condition to accept a fee, also that he could do nothing against the city and did not wish, for

appearance's sake, to be consulted in the cases. The one who retained him said that he did not want him to do anything, and that all he wanted was that he should not be employed against him. The city had already engaged other counsel. The attorney in question did not have anything further to do with the cases, and offered to give his successor in office any information about any cases in the office. The court after a very lengthy opinion upon the law suspended him for six months. *In re Cowdery*, 69 Cal. 32. The attorney who offered and paid the retainer was likewise suspended for the same period. *In re Whittemore*, *Id.* 67. In another case the respondent as District Attorney had drawn an indictment which had been found a true bill by the grand jury. Seven years later as attorney for the defendant, he successfully moved to set aside the indictment. In that he was not assisted by information received in his capacity of District Attorney. The court said: "Neither his ignorance of the law, nor the crudity of his notions of professional ethics, can excuse an offense against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the circumstances of each case. The punishment which should follow an inadvertent or ignorant departure from professional propriety—no seriously evil consequences having resulted—should be less severe than where the offense is a deliberate or corrupt violation of official oath. The circumstances presented by the record, while they go towards showing an absence of intentional wrong, do not justify respondent. However innocent his motives, his conduct must be condemned." He was suspended for three months. *People v. Spencer*, 61 Cal. 128. In *Price v. Grand Rap. R. R. Co.*, 18 Ind. 137, the circumstances resembled to a certain extent those in the present case. The defendant had employed one attorney to whom alone he was willing to trust his cause, but other persons interested in the question employed another attorney to act as associate counsel. The defendant accepted the services, treated such associate counsel as his, consulted with him and he

took part at the trial. Such counsel acted for the plaintiff on a second trial of the case four years later. The court said, referring to the first trial: "Beyond doubt, in this state of facts, he is to be regarded as having been the attorney of" the defendant "equally as though he had been feed by him." A new trial was granted for error on the part of the lower court in not excluding the attorney from acting for the plaintiff on the second trial.

In the case of Mr. Thompson, after making all due allowances for the looseness of the relationship of attorney and client between him and Mr. Sumner, and giving him all the benefit of doubt that reasonably can be given as to the extent of his knowledge as to the understanding of the parties, especilly Mr. Sumner, at the settlement, and taking into consideration his comparative youthfulness (though he disclaims any desire for allowances on this account), the fact that, as appears from the evidence, he acted to a large extent under Mr. Humphreys' directions, and the good reputation that he has borne in the community, we do not see how, consistently with our duty under the circumstances, the penalty can be less than suspension for one year. In the case of Mr. Humphreys the penalty on the charges thus far considered should be no less than in the case of Mr. Thompson, but a graver charge is made against Mr. Humphreys individually, that of attempting to persuade Mr. Magoon to betray his client, Mr. Sumner, which will now be considered.

On the day after Mr. Sumner, in company with Mr. Magoon as his attorney, drew the balance of the money, \$48,025, from the Bishop, Mr. Humphreys called at Mr. Magoon's office, and the following took place, according to Mr. Magoon's testimony:

"Mr. Humphreys came into my office and said he wanted to speak to me on a matter of grave importance. I gave him an audience. I think we were closeted alone in the room. He told me it was the Sumner matter, he said he had been told that I had withdrawn or assisted Mr. Sumner in withdrawing money

from the Bishop and depositing it in the Bank for Mr. Sumner. He gave me a letter which he said he had sent to Bishop & Co. * * * He stated that it was an improper thing for me to have done, to have withdrawn this money, but he said that he wanted to settle the matter—that he did not—said that he would make an offer of compromise which would be satisfactory to all concerned he thought and his suggestion was—he offered that the Ellises take \$30,000 and Mr. Sumner take the rest, \$18,025. I told him that was not a fair compromise, in fact wasn't a compromise at all and that I could not recommend it to my client. Still he said, the old man Sumner was going to Tahiti, he would not want very much money, would spend it all, it would be enough for him. I said I thought not, I didn't think it fair that the Ellises should take the whole \$30,000 and give Sumner \$18,025, that didn't seem to be fair. He said 'You don't care anything for Sumner, what do you care for Sumner? Let him go. What do you care, what do we care if we can get our fees out of him. They will spend the money anyway.' I still persisted and said I did not think it was right, I did not think Mr. Sumner will agree to it. He said he would agree to it if I would advise it. I said I could not advise it. Finally he said, 'If this settlement is agreed upon I can charge the Ellises \$5,000 for my services,' and that I might charge \$3,000, * * * I could get \$3,000 out of it and that he could get \$5,000; that was we cared for, that was our fees. And I said, no, I could not do it. Then he said, 'Well, you think it over, you think the matter over and talk it over with Mr. Sumner and let me know.' I said 'Well, I will do it,' I would submit the matter to Mr. Sumner anyway. * * * He said that he would bring suit on behalf of the Ellises unless this matter was compromised, bring suit on behalf of the Elises, bring suit to regain this money, as he had notified Bishop & Co. that he would do. I said, that was all right, go ahead. He said, 'And I will see to it that Sumner will never get a dollar of it. I will keep this in Court until after Sumner's death. He never shall have a dollar of this money. If I am beaten before the Circuit Court, and I don't think I shall be, I shall take it to the Supreme Court, the Supreme Court of the Territory and if I am beaten there I shall take it to the Supreme Court of the United States. I shall not be beaten by anything. I will keep it in litigation

so long as Sumner lives.' I said, 'You cannot do that, take it to the Supreme Court of the United States. There is no federal question involved. You cannot take it to the Supreme Court of the United States.' 'Oh,' he said, 'You can make a federal question in any case. You can raise a federal question in any case, pretty nearly in any case you could get it in, it doesn't make any difference what it is, whether it is valid or not, you can take it to the Supreme Court, and I will see that it is kept in litigation as long as Sumner lives and that he will never get a dollar of it.' * * * * Before he went away he said I must not say anything about fees, he spoke to me confidentially. 'We must keep that between ourselves.' "

Afterwards, Mr. Magoon, having seen Mr. Sumner, went, as he testifies,

"to Mr. Humphreys' office on Bethel street and told him that I came for the purpose of ascertaining whether some reasonable settlement could not be made. I said that the settlement 'you' propose is out of the question and he did not let me finish, he stopped me before I finished, saying what I had to say. He said, 'well now, if you have come for a settlement I want to have you understand that I will not take anything less than \$30,000. I will not take \$29,999.99. I want \$30,000 or nothing.' I said, 'Well, if that is the way you feel about it there is absolutely no use for us to talk. I don't want to waste your time nor mine,' and I turned round and left the office without any further talk."

Mr. Humpheys' version is as follows:

"I then said to these people (the Ellises), arranged with them for getting a \$1000 fee for this money. I knew Mr. Sumner's age, about eighty-five years of age. I said—I was reasoning to myself—I said, here is \$48,000, call it \$50,000. Invested at 6%, would make \$3,000, a fair rate of interest on a trust fund, \$3,000 per annum. Mr. Sumner's life expectancy cannot in the nature of things exceed five years. That would leave him \$15,000 from the \$48,000, \$3,000 a year. \$30,000 would go to the Ellises. I thought the \$3,000 would be used in effecting a settlement, believing at that time, not having seen the trust deed, that the trust might be terminated. I made the contract on the basis of \$30,000 and they paid me cash, a fee of \$1,000. After leaving Bishop & Co. with this

letter, I met in front of the Post Office, Clinton J. Hutchins. I asked him what would be the expectancy of a man about eighty-four and he said three and a fraction years. I had granted Mr. Sumner five years, not having any table at hand. Mr. Hutchins said it would be three years and a fraction (8-10). I went from there to the recorder's office and made a pencil copy (of the trust deed) which was afterwards typewritten by my stenographer. Returning from the Recorder's office I stopped in at Magoon's and informed him of the letter which I had written to Bishop & Co. He asked me if I had a copy of the letter and I told him that I had and that I would send it to him during the day, which I did. I asked Magoon for the will. He says—I said, 'This will has been delivered to you, I would like to see it.' My recollection is that he said it was destroyed. He either said cancelled or destroyed. I might have construed the word cancelled, thought it convertible with destroyed. He denies that he said it was destroyed, he says he said it was cancelled. Probably that is true. It is more than likely that he used that term and I understood by that that it was destroyed. He then asked if there was a possibility of a settlement. I told him that there was—of Sumner's life expectancy, of the conversation I had had with Hutchins and my own expression. Well, take it at five years, that would be \$15,000. There will be \$3,000 left over for chips and whetstones. I did not propose to Mr. Magoon that I would charge \$5,000 and he could charge \$3,000, nor did I propose to charge my clients \$5,000 because I had made a contract which had already been paid, for the services which were contemplated."

These two versions are flatly contradictory in the parts which are now of chief importance. They cannot be reconciled on any theory of misunderstanding or failure of memory. Which witness should be believed?

So far as interest is concerned Mr. Humphreys has almost as great an interest as it is possible to have to avoid the natural consequences of Mr. Magoon's testimony. Mr. Magoon's only interest, so far as can be contended, is to get even with his brother-in-law, by practically ruining him, because of the abuses which the latter has heaped upon him in the Ropert case. The

contention is in substance that the respondent has practically disqualified the witness against him by taking pains to give him cause for retaliation. It is hardly likely that Mr. Magoon would deliberately and premeditatedly concoct a story of this sort for the purpose of inflicting such dire results upon one in Mr. Humphreys' position. There was nothing in Mr. Magoon's attitude or testimony to indicate that he was falsifying. And, as for feelings of animosity or ill-will, none were manifested on the part of Mr. Magoon, while scarcely more could be shown on the part of Mr. Humphreys. Mr. Magoon no doubt felt deeply grieved at Mr. Humphreys' unjust abuse of him in the Ropert case. If he had not, he would scarcely have been human. But throughout the Ropert case, so far as we can see, he refrained as far as he could from introducing questions of differences between counsel. When he reflected on opposing counsel it was only in so far as he had to adduce facts and argue from them in the interest of his client. He did not go out of his way as did Mr. Humphreys to attack counsel. He restrained himself as well as could be expected, considering the provocation. But we are not obliged to rely solely on the appearance and attitude of the witnesses on the stand, nor on their respective personal interests. There is much that tends to support Mr. Magoon as against Mr. Humphreys.

The respondents in their answer in these proceedings as well as in their testimony take the position that all offers of compromise in the Ropert case came from Sumner's attorneys, and Mr. Humphreys in his testimony above quoted says that the offer to compromise on the occasion now in question came from Mr. Magoon. As a matter of fact, with the exception of the instance above shown, when Mr. Magoon after he had seen his client at Mr. Humphreys' request, went to the latter, to see if some reasonable compromise could not be effected, was steadfastly opposed to compromises throughout. This is established beyond a doubt by the witnesses on both sides. Mr. Magoon's associate, Mr. Davis, apparently was eager to compromise and Mr. Magoon had to resist his importunities as well as those of

opposing counsel. There was much negotiation for a compromise later on. The proposition, which may have originated with Mr. Davis, was to settle by Sumner's paying the Ellises between \$10,000 and \$15,000. The furthest that Mr. Magoon got was to yield against his will, at the desire of his client, Sumner, to a proposition to pay \$12,000, but he successfully held out against the respondents' insistence on \$1,000 more to cover their fee, and thereupon the negotiations ceased. The fact that Mr. Humphreys calculated the amounts and consulted an insurance agent on the basis of Sumner's expectancy of life, before going to Mr. Magoon's office, also shows pretty clearly that he went there for the purpose of proposing a compromise.

The nature of Humphreys' conversation on the occasion in question, as one of the threats and bluff, is corroborated by his attitude throughout. In the first place, there is much reason to believe that his proposition to take \$30,000 for the Ellises was not made in the best of faith or as a proposition to be considered on its own merits alone. We need not consider what Mr. Humphreys already knew as to the understanding at the previous settlement. Nor need we more than advert to the fact already mentioned that Mr. Humphreys was later willing to accept \$13,000. He attempts to make a plausible case on the basis of Mr. Sumner's life-expectancy. He does not, however, consider that of the entire \$110,000 Sumner had not received a cent, other than the \$48,025 then in question, or that \$62,000 had already gone, or that the Ellises had already received \$30,000. He accused Mr. Magoon of having done an improper thing and said that he would get into trouble because he had assisted in obtaining the money from the trustee and that without first examining the trust deed, although the trustee as well as Mr. Magoon's client considered that the latter was entitled to the money, which, as the court afterwards held, was the fact, and Mr. Magoon had suggested to the trustee that he consult his attorney, Mr. Stanley, before paying over the money. And yet that was just what Mr. Humphreys' firm had done. They had assisted in taking out \$62,000 without looking at the trust

deed. Mr. Humphreys, it is true, says that he would not have taken his \$2,500 fee at the time of the settlement without examining the trust deed, but he did not suggest to Mr. Thompson to examine the deed when the latter told him of the proposed settlement and he was ready enough to share in the fee after it had been paid, without examining the deed. Again if Mr. Humphreys had known the contents of the will, which he contends was made a part of the deed by reference, he would have known that by the terms of the trust the Bishop (for the church and St. Louis College) was a beneficiary remainderman after Sumner's death to the extent of one-fourth of the trust fund absolutely, and that each of the Ellises was a beneficiary remainderman to the extent of one-fourth only for the life of the survivor of them, and that subject to certain conditions. Mr. Humphreys says that he had not seen the will, though he says that he had previously had a general knowledge of its contents. But he did not think it worth while to ask Mr. Highton as to its contents although the latter had told him seven weeks before that he had examined it, nor did he think to inquire of the trustee or the latter's attorney who would be likely to have known the terms of the will. But Mr. Humphreys says that he had, on his way to Mr. Magoon's on that day, copied the trust deed from the public records. He therefore knew its contents. That, apart from the will, showed that Sumner's heirs, then, of course, unascertained, were the remaindermen, and Mr. Humphreys knew that Mrs. Davis was an heir apparent to Sumner to the same extent as the three Ellises together, and yet she was left out of his calculations. .

In the next place, Mr. Humphreys' attitude was one of threat and of harassment of Mr. Magoon throughout. He began with a tirade against Magoon in the answer which he drafted for the Ellises in the Ropert case. To use his own concessions on the witness stand, "a great deal of it (the answer) is impulsive and immaterial, impertinent matter." Speaking of a particular portion of the answer, he concedes that it "is an abusive statement." In this connection reference may be made to an allega-

tion in the complaint to the effect that Mr. Humphreys did not sign the answer as counsel because he knew that he could not properly appear against Sumner in that case. We do not find this allegation sustained. We believe Mr. Humphreys' explanation, which, we may add, is corroborated by Thompson and Watson. He says that just before drafting the answer he told Mrs. Humphreys of his intention and that she deprecated the idea of making charges against Magoon, in view of her relations to Mrs. Magoon, and that, out of deference to her wishes, he suggested to his partners that they alone sign the answer, which they did in their separate names as "solicitors," but that soon after it struck him, Humphreys, that "it was an inconsistent thing to do," that it looked "like shooting from ambush, as disingenuous." Thereafter he appeared on record, signing his name separately as "of counsel." He was the leading counsel in that case and throughout, both below and in this court, his attitude was one of the extreme bitterness and asperity towards Mr. Magoon. It seemed as if the greater part of his lengthy argument in that case in this court was directed against Mr. Magoon rather than for his own clients, and after asking in this court for an immediate investigation of the conduct of all counsel in the case and acquiescing in a reference of the matter to the Attorney General by this court, he neglected and declined to make any statement in response to the written request of that official. In his argument in the present case, and this is equally true of Mr. Thompson's argument, he went to a length deserving of severe censure. Both respondents were allowed unusual liberty in their arguments in view of the peculiar position in which they were placed.

Reference may be made to some particular instances showing Mr. Humphrey's threatening attitude, some of which occurred outside of the court. Mr. Wundenberg, who is connected with Mr. Magoon in business, says that on one occasion,

"Mr. Humphreys came to my office and made this remark, something to this effect, that he was tired of talking to Mr. Magoon and he addressed himself to me, and, as my recollection

goes, it was as regards the filing of some instrument in the case with Sumner. He stated that if that was filed he would file an answer that would raise the roof off the Magoon building and part of the Judiciary Building," and, on cross-examination, he says, "it struck me as a threat, if Magoon did certain things, you would do certain things."

Mr. Humphreys says that Mr. Wundenberg's statement is substantially correct, that the document referred to by him, Humphreys, was the Ellises' answer in the Ropert case, and that that was the way he felt. Mr. Lightfoot, an attorney associated with Mr. Magoon in practice, testified:

"I had been, I was working in the library and Judge Humphreys was also working there, and and having finished our work we began to speak about the Sumner case as it was called, meaning the case of Ropert against Sumner. Mr. Humphreys stated that he did not care particularly how Judge De Bolt should rule in that case, that if it were not for the fact that it would be considered a discourtesy by him towards the court, he would not even argue the case. Mr. Humphreys further stated in very emphatic terms that he was confident that he would win out before the Supreme Court of the Territory of Hawaii and producing a large number of gold coins from his pocket, offered to wager with me that sum against a small sum that he would so win. Mr. Humphreys further stated that in the event he (Humphreys) should be defeated in the appeal—in the appeal to the Supreme Court of the Territory of Hawaii, in case such an appeal would be taken, he would further appeal to the Supreme Court of the United States of America and that John K. Sumner would never see—never live to see the end of the litigation."

Mr. Humphreys does not dispute this, but contends that he was in earnest and felt confident that he would win, and that he, as Mr. Lightfoot also says, mentioned the possible disqualification of two members of this court as a basis on which to raise a federal question. In February, upon Mr. Magoon's having said to Mr. Humphreys' partner, Mr. Watson, that he intended to move in this court that the Ropert case be advanced on the calendar, Mr. Humphreys, referring to the proposed affidavits

in support of the motion, wrote to him: "Go ahead and file your affidavits and we will meet you with counter-affidavits, and we think we have a surprise in store for you." The surprise related to a trust deed which had been executed by Sumner to R. W. Davis after the Ropert suit had begun, covering a portion of the fund in dispute. There certainly could be no objection to Mr. Humphreys being confident of his case or to his intention to appeal it from one court to another, if necessary, as long as any appeal would lie, if such were the facts, nor to his expressing himself to that effect in terms as emphatic as he pleased. Even an attempt at a game of bluff resorted to in his ardor for the interests of his clients might, at least if within certain limits, be overlooked. That is not the question. The question is whether his conduct as a whole in this direction, especially considering its groundlessness and, we may add, Mr. Humphreys' prior friendliness to Mr. Magoon, does not tend to corroborate to some extent, and we think it does, Mr. Magoon's testimony as to the attitude of Mr. Humphreys at the interview on the 22nd of October. At that time they were on exceedingly friendly terms, as they both testify. They called each other by their first names. Mr. Humphreys and his family visited Mr. Magoon and his family at the latter's country places at the beach at Kaalawai and in Nuuanu valley. They were brothers-in-law.

Reference will now be made to particular matters upon which this respondent relies to show that Mr. Magoon perjured himself. We have already mentioned his contention that Mr. Magoon must have felt revengeful towards him in consequence of his abuse of him. Another point relied on relates to the matter now in question. It is that Mr. Magoon was not particularly impressed at the time of the conversation in question that Mr. Humphreys' proposition was dishonorable. It may be that Mr. Magoon's sense of professional ethics was not of the highest or at least that Mr. Humphreys did not so regard it. If the latter had so regarded it, he would not have thought of making

such a proposal to Mr. Magoon. But this much may be said, that, as already stated, the two were on most intimate terms, and naturally Mr. Humphreys on the one hand would think himself safe, especially if he thought Mr. Magoon a little weak in this direction, and Mr. Magoon on the other hand would not be so likely to express resentment at the proposal. As a matter of fact he persisted that, while he said that he would mention the matter to his client because Mr. Humphreys requested it, he could not advise his client to accept the proposition. That it did not strike him as glaringly improper to the extent that it ought to have, does not show that he falsified in his testimony. If he were bent, as the contention is, on procuring Mr. Humphreys' disbarment, to such an extent as to fabricate his story out of nothing, he could easily have made it worse, and certainly could have expressed greater disapproval of Mr. Humphreys' conduct. The following from Mr. Magoon's cross-examination shows how he did express himself on this point.

Cross-examination by Mr. Humphreys:

"Q. I told you I would charge \$5,000? A. You did. Q. Also that you could charge \$3,000? A. You did. Q. You looked upon it as unconscionable, did you not? A. Unfair. Q. Do you look upon it as dishonorable? A. I did not at the time, I did not think it was dishonorable so far as you were concerned. I did not know what motive was there. Q. You did not show any resentment, did you? A. I did not. Q. Did you suggest the impropriety of the proposal—that it was an improper proposal for me to make you? A. I did not * * * Q. I asked you to keep this matter secret? A. You did. Q. How did that suggestion impress you? A. As to keeping secret? Matter of fact. Q. You say you did not regard it as improper? Now I suggested that you charge what you considered an unfair fee and that I take for me what you thought an extortionate and unconscionable sum? A. I never said it. Q. I asked you to keep it secret. Was that inconsistent with candor, honor and professional propriety and fidelity to my client and your client? A. In the first place I could not charge a fee of \$3,000 without my client knowing it and you could not charge a fee of \$5,000

without your clients knowing it and if your clients, if you wanted to charge them \$5,000, as far as I was concerned, I did not care to keep it secret, but you wanted it kept secret, so I said nothing. Q. In connection with my asking you to keep it secret it didn't impress you that I was pursuing a course of dishonesty? A. I did not give it a thought one way or the other. I should not charge a \$3,000 fee for the work I had done. You said I could do so but that didn't make any difference to me. Q. You have testified disparagingly of the proceeding, you have testified on the theory that it is relevant and that it tends to impeach me as a member of the bar. I ask you why you didn't think so at the time and now think so? A. I didn't say I now think so."

Cross-examination by Mr. Thompson:

"Q. Now, Mr. Magoon, when Judge Humphreys made the proposition to you to settle for \$30,000, he to receive a fee of \$5,000 and you to receive a fee of \$3,00, you regarded the proposition as unconscionable? A. Yes, I did. Q. Just a moment until I get through and we will get along more rapidly. A. Excuse me, I thought you had finished. Q. And refused to accept it and said yesterday that you would not have charged a fee of \$3,000 if you had settled the matter? A. I did and I say so still. I do think it is absolutely unconscionable and unreasonable to get parties to compromise like that and then charge a fee of \$5,000 for it. There was no litigation in court, nothing to do, but simply come up to my office. It was outrageous and besides it would leave Mr. Sumner only \$18,000 and I take \$3,000. Now, how much fee did you receive in the settlement of Maria S. Davis? A. I received \$2,500. Q. What did you do in that settlement? A. I did nothing in the settlement, but one time I had an interview with you. That is all. How much did Mr. Davis get? A. I don't know. Yes, I do. I don't know how much got. I know how much he said he got. Q. How much was it? A. He was to get \$5,000. He gave me half of his fee. He told me he would. Q. You got one-third of \$15,000? Mr. Magoon and Mr. Davis meaning the team who worked together, you and Mr. Davis got one-third of \$15,000 as a fee for it but one-sixth of \$18,000 was unscienable? A. No, in one case it was merely a bluff as I construed it, absolutely, demand, stand-up, hold-up of Mr. Sumner, to pay

\$18,000 without my reason, right, justice or any equity about it and to charge \$5,000 for work of that sort certainly without doing a thing excepting come into my office, I think is unconscionable and outrageous. Q. Didn't you say yesterday that you saw nothing improper in it and did not so regard it? A. So far as anything criminal I saw nothing improper in it. Q. Then— A. Let me finish. There was nothing you could charge Mr. Humphreys with as criminal, but so far as the proprieties, so far as the reasonableness of it, I said yesterday I would not take \$3,000 if I had compromised that matter as a fee. Q. Then impropriety with you means only criminalty? A. Well it might be, I don't know about that. Q. Didn't you say yesterday, you saw nothing improper in it and that you submitted it to your client? A. In that sense I had to submit it to my client. I said to Mr. Humphreys—as you have—as he came to me there was nothing improper—I said, 'Mr. Humphreys, I would refuse to recommend it to my client.' He said, you think the matter over and then let—me know. Q. Did you say that yesterday, that you refused to recommend it? A. I think I did. I think I said so; I am pretty sure of it. Q. But you did say yesterday that there was nothing improper in it and you did not think so. A. What I had reference to in improper proposal in the matter, he made no attempt to pay me any part of his fee. It was in the nature of a threat. He said to me, 'You have been doing an improper thing. You are going to get yourself into trouble here. I am going to bring suit, I am going to expose it.' I said, 'All right, go ahead.' That didn't phase me at all. Then he said he would prolong litigation, we could get nothing out of it during Mr. Sumner's life time, I would not get anything. That proposition to compromise. There was a certain thing—I was under obligations to him, he has been to my house any number of times, we were friendly, I had treated him as such, we had been on most intimate terms, I had done everything possible. He said he would get \$5,000 if I could—if I would consent, I would benefit him \$5,000 and could get \$3,000 myself. I simply said, 'No, I would not, I could not do it.' I would rather submit the proposition to Mr. Sumner, but I was sure he would not talk. Q. How Judge Humphreys came to you with a blackmail, a bluff you call it— A. I considered it a bluff. It is a proposition to blackmail, but he might have

thought that he had a good show. He said, 'I will beat, beat. You haven't a show. I am confident I can beat it in the Circuit Court. I will beat you and you'll never get a dollar of it.' Q. Did he threaten to verbally chastise you, didn't he? A. No, he didn't. 'You are going to lose; the matter is coming up,' he said. Q. The proposition to blackmail your client didn't offend you? You saw nothing improper in it? A. The way I looked at it, there was nothing to blackmail. Q. The way you looked at it? Oh, point of view. I want— A. Here is a man I had been on the most intimate terms with. I didn't want to consider it in the light of blackmail. He didn't consider it so. I did. As far as the circumstances I considered it in the light of blackmail. Q. Yet you swore yesterday he considered it proper? A. If he thought it was proper he had that right. Q. Were you swearing to Judge Humphreys' opinion yesterday or your own? A. I didn't see anything in his making a proposition if he thinks it right. To him it was all right. As far as the proposition, it was an outrage. From his standpoint it might be proper. From my standpoint it was absolutely improper. He didn't bribe me in any way—didn't say he would give me a part of his fee. 'You can charge \$3,000 in this matter. Sumner will spend the money. You don't care anything about Sumner. What do we care for him?' Q. And all that you did not deem improper and take any offense at? A. How could I take offense at it?"

There were several collateral matters relied on as tending to show Mr. Magoon's alleged incredibility. One relates to a certain power of attorney from Sumner to Magoon and a certain deed from Sumner to R. W. Davis—which were drafted in Magoon's office during the pendency of the Ropert case. The real object in going into this matter apparently was to show that Mr. Magoon had himself acted in an improper manner, and especially that he had attempted a fraud on the court but, that failing, an attempt was made to show that he falsified as to the nature and contents of those instruments. The attempt was to contradict him in those respects by the testimony of the notary public who took the acknowledgments to those instruments. But practically the only difference brought out was

that Mr. Magoon thought that the power of attorney was a special power of attorney because, among other reasons, he could not act under it in any particular without first obtaining the approval of R. W. Davis, while the notary had entered in his book his classification of the instrument as a general power of attorney. It is true, Mr. Magoon testified very reluctantly on those matters, but he kept nothing back when the questions were specifically put to him, and, of course, he naturally could see no reason why he should be questioned upon those instruments. These matters were irrelevant. The testimony was admitted on Mr. Humphreys' promise to connect it, which he failed to do.

Another matter replied on for the same purpose is a contradiction between Mr. Magoon and Mr. Humphreys in regard to a conversation in which one of them called the attention of the other to the fact that a certain affidavit had been filed in one of the Sumner cases some years ago, which, it was claimed, might be used in Washington to prevent the railroad company from effecting a compromise with the Federal government in regard to the title to the Sumner property involved in the railroad suit. The most that could be contended on this point is that we have merely Mr. Humphreys' statement against Mr. Magoon's, and the fact that they contradicted each other as to that would not show that Mr. Magoon as against Mr. Humphreys falsified as to the proposition made to compromise on October 22. But so far as the indications go we are not sure but that they favor Mr. Magoon. There are several alleged points of difference in their statements. One relates to the time when the conversation took place. Mr. Humphreys says that it was August 18, the night of a certain fire. Mr. Magoon says that it was when Mr. Humphreys spoke to him about going into the case, as to which Mr. Humphreys agrees, but that he does not remember whether the case (the railroad case) was already begun or about to be begun. There is no contradiction there. Another point relates to the place where the conversa-

tion took place. Mr. Magoon says that it was at his beach place at Kaalawai when Mr. Humphreys was visiting there. Mr. Humphreys says that it was on the ride to the fire from Mr. Magoon's valley place when he, Humphreys, was visiting there, and that he visited Kaalawai in April, long before the case was begun, though he does not say also that he did not visit there afterwards. According to Mr. Humphreys, he and Mr. Magoon had talked over the Sumner matter at length the evening before, he, Humphreys, beginning the conversation and having that subject much on his mind, and Mr. Magoon made the suggestion as to the affidavit when they were riding to the fire at about two o'clock in the morning. Mr. Magoon says that they were that night driving at a three minute gait down hill in darkness and that both were intent on the fire, each fearing that his own property was in danger, and that he himself had all he could do looking after the horse, and that he did not think the matter of the affidavit was mentioned during those ten minutes or less of excitement. Suppose the conversation did occur on that drive. That was merely a matter of memory as to the particular occasion when a conversation took place and did not affect the truthfulness of either witness as to what was said or even as to the occasion. Another and more important point of difference relates to who made the suggestion as to the affidavit. Each says that the other did. It seems that both were attorneys in the case in which the affidavit was filed, but that the affidavit was filed by the firm then consisting of Mr. Humphreys and another, and that Mr. Magoon, who was on the other side, had ceased to take a leading part in the case, other counsel having come in as leading counsel. The fact that the suggestion was to make use of the affidavit in Washington and that both witnesses agree that Mr. Humphreys was the one who mentioned Washington, and that the matter was on his mind and that Mr. Magoon had no thought then of coming into the case and that Mr. Magoon, when afterwards asked to come in on the other side, first telephoned to Mr. Humphreys

to see if he had any objections, in view of their previous conversation, tends to confirm Mr. Magoon. But, after all, what difference does it make? It was at most merely a question of memory, not involving a question of truthfulness on either side. We have referred to it, and to the other matters under this head, at such length merely because so much is made of them by this respondent. The credibility of a witness cannot be shaken in this way. It seems child's play to go into these collateral matters involving mere questions of memory. If they tended to show Mr. Magoon false to his oath, there are other things that, on similar reasoning, would show beyond doubt Mr. Humphreys' falsity. He has made statements which are beyond question false, but which we have no hesitation in saying he did not intend to make. They can easily be accounted for on the theory of inadvertence or impulsiveness or recklessness. As to how far he should be regarded as credible in general, as shown by all the matters in the case, many of which are set forth in this opinion, we need not say. The question is not so much whether he is false as whether Mr. Magoon is to be believed as to what he said as to the proposition of October 22. It is impossible to set forth fully in written detail all that contributes to one's conclusion concerning the credibility of a witness. We feel convinced that Mr. Magoon told the truth as to the conversation that took place between him and Mr. Humphreys on the 22nd of last October.

Mr. Humphreys, on the evidence, is guilty of having attempted to induce Mr. Magoon to betray his client—an aged credulous man easily imposed upon and of whom others, as Mr. Humphreys knew, had previously taken advantage. In order to accomplish this he urged considerations of personal friendship, resorted to threats, and suggested large booty. "What do we care for Sumner, yet him go, all we care for is our fees." There is but one conclusion—disbarment. As Mr. Justice Brewer said in the passage quoted in the first part of this opinion: We "cannot tolerate for a moment, neither can

the profession, neither the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession." Attempting to induce another to betray his client is as bad as proposing to betray one's own client—perhaps worse. That was the position taken in the *Cowdery* and *Whittemore* cases above cited. The imposition of the penalty is not merely for the purpose of punishing the wrongdoer. It is even more for the protection of the profession and the public.

The judgment of the court is that the respondent Frank E. Thompson be and he is hereby suspended from acting as an attorney or counselor at law in the courts of this Territory for the period of one year from this date, and that the respondent A. S. Humphreys be and he is hereby disbarred, and that his name be and it is hereby stricken from the roll of attorneys and counselors of the courts of this Territory.

Attorney General L. Andrews and Assistant to the Attorney General, P. L. Weaver, in support of the complaint.

Respondents in person; John W. Cathcart also for respondent F. E. Thompson.

DISSENTING OPINION OF GALBRAITH, J.

I am compelled to dissent from many of the findings made and the judgment pronounced in the foregoing opinion, although I do concur in the finding that the respondents were guilty of professional misconduct and impropriety in appearing against John K. Sumner in the Ropert suit after having appeared of record for him in the guardianship proceedings. However, I am not convinced that the respondents can be properly charged with turpitude for so doing. It is not found that there was any contractual relation existing between Sumner and the respondents or that the relation of attorney and client existed between them to its "full extent" and the evidence wholly fails to show that by reason of their connection with the

guardianship case they obtained any secrets or special information that was used against Sumner in the Ropert case. There was no betrayal of confidence, for Sumner reposed no confidence in either of them, nor does it appear that they gained any advantage in the latter suit by reason of their connection with the former.

The difference in opinion between the majority and the minority of the court in this instance is due largely, I believe, to the difference in the conclusions drawn from the evidence. Still I do not consider it necessary to go into a minute analysis of the voluminous evidence in the record but shall content myself in a large measure with a statement of the conclusions of fact that I believe should be drawn from the evidence so far as the same may be considered material to the issue here presented.

It appears that Henry E. Highton was retained in the suit of the Railroad Company against the Bishop, as Trustee, and John K. Sumner for specific performance of the option for the sale of the reef property, by the Ellises, prior to the return of Mr. Sumner to the islands, on August 20, 1902, and that this employment was ratified by Sumner shortly after his arrival; that Mrs. Buffandeau paid Highton \$125 on his retainer fee of \$500; that the relation of attorney and client did exist between Mr. Highton and the Ellises (and when I refer to the Ellises I mean to include Mrs. Buffandeau); that Mr. Highton advised the Ellises shortly after his employment that the will of John K. Sumner, referred to in the trust deed to the Bishop, was a part of the deed and that the deed was irrevocable and that the Ellises were beneficiaries under the trust therein created, and had an interest in the property and suit; that Mr. Highton afterwards changed his mind on the revocability of the deed and concluded that the trust deed was revocable but he did not advise the Ellises of this change of mind; that on October 10, 1902, he wrote a letter to Sumner and the Ellises in which there was a rather veiled statement of his changed views relative to the trust deed and also wrote an answer to this letter and procured it to be signed

by Sumner and the Ellises in which it was stated that they thoroughly understand his letter and that the facts therein contained were correct; that Mr. Highton did not advise his associate counsel for the Ellises, the respondents, that he had written such letters until long afterwards; that Mr. Highton, on September 4, 1902, acting for Sumner and the Ellises, had practically agreed upon terms of settlement of the railroad suit—then the only suit pending against Sumner—and for the conveyance of the reef property to the company on the payment of \$102,500; that there was a meeting on that day at Highton's office and that Sumner and the Ellises and R. W. Cathcart were present and that prior to that date Sumner and the Ellises were very friendly; that there was a disagreement between Sumner and the Ellises as to the disposition of the money expected to be received from the railroad company; that while this meeting was in progress and as a result of the dissatisfaction of the Ellises with a proposition to place the expected proceeds of the sale of the property in trust for the benefit of the Ellises, W. S. Ellis telephoned for the respondent, Humphreys, who came over to the meeting and after being advised of the situation announced that he had been employed by the Ellises and as their attorney advised against the proposed trust and the sale of the property for the \$102,500 for the reason that the property was worth much more money than that amount; that on the same day Humphreys and Highton went to see the attorneys for the railroad company to find out if a greater sum would not be paid for the property and the proposition was taken under consideration by the attorneys for the company; that afterwards, and during the night of September 4, the suit to place John K. Sumner under guardianship and the injunction suit to restrain the sale of the reef property were commenced; that Highton treated the Ellises as interested parties in all this litigation although none of them were parties to the record in any one of the three suits; that when service was made on Sumner in these latter suits the Ellises and Sum-

ner took the papers to Highton and Highton in turn took them to the office of the respondents for the purpose of a conference relative to the line of defense; that Humphreys refused at first to have anything to do with these suits but on being reminded by Highton that the Ellises and Sumner had a common interest as against the parties bringing these actions and that if Sumner was declared insane that would block the sale of the land and prevent the Ellises from realizing any part of the proceeds; that the respondent Humphreys then consented that the respondent Thompson might assist Highton in conducting the defense in the guardianship suit with the distinct understanding between the respondents and Highton that he did so representing the supposed interest of the Ellises; that the reason for the employment of the respondents on September 4, was the disagreement between Sumner and the Ellises over the disposition to be made of the proceeds from the sale of the reef property, the Ellises believing that the greater amount realized from the sale the more money they would get from it; that Highton prepared the answer in the guardianship suit and submitted it to the respondent Thompson who signed the firm name "Humphreys, Thompson & Watson" under that of Henry E. Highton as attorneys for John K. Sumner; that Thompson appeared in court during the trial of that cause with Highton, as one of Sumner's lawyers and was also active in negotiating the compromise that result in a settlement of the suits; that it does not appear that the respondent Humphreys knew that his firm name had been signed to the answer of John K. Sumner in that suit but it does appear that he had sufficient knowledge of Thompson's connection in the case to put him upon inquiry before taking the inconsistent position he did in the Ropert case. The respondent Thompson, of course, had actual knowledge of the part he had taken in the guardianship suit and that he had appeared therein as attorney for John K. Sumner, there was for that reason, less excuse for his appearance against Sumner in the Ropert case than for the respondent Humphreys.

Although this court found in the decision of the Ropert case that it was understood by the parties present and interested, at the so called settlement and partial distribution, at Mr. Highton's office, October 13, 1902, that the balance of the fund (\$48,025) should go to John K. Sumner free from the trust, in the light of the evidence given in this proceeding I am not sure that that finding is correct. This question is material in this proceeding as it affects the motive of the respondents and should in a large measure determine the punishment to be inflicted.

Mr. Highton in whose office the transaction occurred and who was the senior counsel for all parties, neither wrote a letter to himself stating what the understanding of the parties was nor did he enter it in his diary—where, it seems, he keeps a record of his daily business transactions, but testifies that his “impression” is that it was a final settlement and so understood by all parties. He also said “He” (Sumner) “was determined that he would give them \$10,000. I remember of one occasion he said, ‘when you have lost your \$10,000 I will have the remainder to give you something to eat.’” Sumner says that he understood that he was to be free of the Ellises and the Davises forever afterwards. Against this evidence is the testimony of every other person present, namely, the Ellises, the respondent Thompson and R. W. Cathcart. And in behalf of Mr. Cathcart I will state that he has no professional reputation to sustain in these proceedings and is apparently a disinterested witness and impressed me, in his manner of testifying, that he wanted only to state the exact truth. These witnesses are supported by the allegation in the sworn petition of Bishop Ropert, the trustee, in the Ropert suit, wherein after reciting the conveyance of the land for the consideration of \$110,000 it is alleged “and thereafter by mutual agreement a portion of said sum of money was divided among the said Victoria Ellis Buffandeau, William Sumner Ellis, John S. Ellis and Maria S. Davis, leaving a balance in your petitioner's hands of forty-eight thousand (\$48,025) dollars, *which it was under-*

stood and agreed should be subject to the trust in said deed mentioned."

It may be pertinent to inquire if this petition does not state the understanding of the parties why did not Mr. Highton in the letter directing the Bishop to pay the several sums agreed upon, also direct the payment of the balance of the money to Sumner? Why was it necessary for Sumner to employ J. Alfred Magoon to go with him to the Bishop to get the money? Neither of these questions have been answered to my satisfaction.

Neither the evidence in the record nor "inferences," however skillfully deduced from collateral incidents in the case, produces in my mind a belief that it was the understanding of all of the parties, at the October 13 meeting, that the "rest" of the money in the hands of the Bishop should go to Sumner free from the trust. The evidence rather justifies the inference that this was an afterthought—possibly suggested to Sumner after the meeting and payment to the other parties.

As to the allegation in Sumner's answer in the guardianship case that the property was Sumner's and he could do what he pleased with it and the repetition of that statement in Highton's letter, I do not attach any particular importance to either. Neither was a correct statement either of fact or law. At the time the answer was filed and the letter written Sumner did not own the property. It belonged to Bishop Ropert, as trustee, and had been so held since September, 1898, and the deed under which the Bishop held the property was on its face irrevocable. This court said on this question in the *In re Humphreys* decision *ante* p. 161, "the deed was *prima facie* irrevocable and it was only in view of extraneous evidence taken in connection with the terms of the deed that the court was led to its conclusion and as to whether such extraneous evidence was sufficient the court was divided." So at the time that answer was prepared and the letter written no careful lawyer could have advised that the deed was revocable and that the property

belonged to Sumner and that he could do what he pleased with it. He had already conveyed it in September, 1898.

I do not think it necessary in this proceeding either to vindicate the courage of any witness or to defend the prowess of the respondents. This is a side issue that may be properly relegated to the "ring side." I respectfully decline to act as referee on such a question.

Looking at the facts from the respondents' view point, and that is the view point the court should assume in passing on the propriety of their conduct in the presence of the court, it is not surprising that the respondents should have shown some feeling towards Henry E. Highton and J. Alfred Magoon. Since from such view point the former had been guilty of gross duplicity towards them and the latter, during the hearing, was firing on them from ambush. Why should not the respondents "shell the wood" for Magoon? It was J. Alfred Magoon who filed the charges with the Attorney General and who at the hearing, not in the open but "from the side line," was furnishing the greater part of the evidence introduced in support of the charges, after he had procured from the Attorney General a certificate of the rectitude of his conduct in the Sumner litigation. I do not condemn them, under such trying circumstances, for the acrimony exhibited. Nor do I believe that they abused the privilege of free speech that should be allowed attorneys when defending before the court charges so seriously affecting their personal and professional reputations.

Prima facie, the Ellises were beneficiaries under the trust deed and will of John K. Sumner and had an interest in the property and any suits affecting it or him. They had a right to employ counsel to protect this interest. They did employ the respondent and the respondents were faithful to their interest throughout the litigation. The serious mistake the respondents made is that they became attorneys of record for John K. Sumner in the guardianship suit and in the Ropert case, a related suit, they were against him. This is a position that no lawyer should permit himself to be placed in.

I concur in the finding of the court that under the law there is no difference in the degree of guilt of the respondents on this charge—they both are equally guilty although one had actual and the other constructive knowledge.

While the individual charge against the respondent, Humphreys, and of which the court finds him guilty, namely, of “attempting to persuade” J. Alfred Magoon to betray his client, John K. Sumner, is a very grave one, I find great difficulty in considering it seriously on account of the character of the evidence by which it is found to be supported.

Judge Cooley said of a disbarment proceeding, “While not strictly a criminal prosecution, it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal.” (*Matter of Hamilton Baluss*, an attorney, 28 Mich. 507, 508.)

The Supreme Court of Illinois held that in order to disbar an attorney, “The case must be clear and free from doubt, not only as to the act charged, but as to the motive.” (*People v. Harvey*, 41 Ill. 277-8.)

It has been held in California that to disbar an attorney is to “deprive him of personal and property rights. Unless we are clearly satisfied of respondent’s guilt we ought not to remove or suspend him from the practice of his profession.” (*In re Luce*, et al., 23 Pac. (Cal.) 350, 354.)

The only direct evidence in support of the charge is the testimony of the witness J. Alfred Magoon. He is flatly contradicted by the respondent Humphreys. The court finds that the former is sustained by certain collateral incidents and inferences, and that the respondent is discredited in like manner and finds that the charge is sustained. One of the reasons given for believing Magoon and disbelieving Humphreys is that Magoon could easily have made the story “worse.” Again it is found that Magoon had no motive to falsify and that his manner on the stand was such as to indicate that he was only performing an unpleasant duty.

In considering this question I cannot overlook the fact that the charge against the respondent is made by Mr. Magoon and that he did not make the charge for amusement and that having made it he would like very much if it were sustained.

To me, Mr. Magoon, as a witness in this case, assumed two different and distinct attitudes, one that of the ready and willing witness with a fairly good memory, the other that of the halting and unwilling witness with bad memory.

In order to illustrate these different attitudes I am compelled to quote from the transcript, and I hesitate to do this for the reason that I know the transcript to be inaccurate in some respects and it may be in others.

The witness appears in the first attitude when testifying to a conversation with a guest at his home some months before.

“But I knew when my attention was first called to it by Mr. Humphreys. It was at my place at Kaalawai, round Diamond Head, where Mr. Humphreys was staying with me. Q. When was that, in what month? A. I don't remember the month, it was while he was still on the bench. Q. What conversation was had between you and Mr. Humphreys at that time, Mr. Magoon? A. He stated to me in talking about the matter that there were proceedings taken or to be taken and that he had been approached and could be called into the case if he wanted to be in it. Q. Representing whom? On what side or what case, please? A. The case was to be brought by the Oahu Railway & Land Company against Ropert, Trustee, under the deed of trust to enforce the conveyance of the property to the company under the lease. We talked the matter over quite generally. He said at that time that he knew of a matter which he thought was a good defense to the action or would be beneficial to the trustee and that was with reference to the affidavit which Mr. Dillingham had signed when the lease had been executed, Mr. Dillingham signed an affidavit which appears of record and which I had forgotten about until he called my attention to it; that in getting—having the lease—in having the option to the lease call for the conveyance of all the land when Mr. Sumner only owned a half of it; Mr. Dillingham had filed an affidavit that he knew that the title was in Mr. Sumner only to half of the land and therefore he could not oblige Mr. Sumner to give

him a good deed or good lease to more than half. That recalled the matter to my mind, which I had forgotten, and in talking over the matter I said I didn't see why he could not take it, take the case. He was about to go off the bench and I told him I did not see what objection there was to his coming into the case, if he went off the bench, in behalf of Mr. Sumner. He said he did not know as there was any objection to it, that he would be called in the case."

Also the following:

"George A. Davis, desired me to assist him in the case which was then pending before Judge De Bolt. Upon receiving that information I telephoned to Mr. Humphreys, because the matters which we had talked about I considered confidential and private and I telephoned him to see if there was any reason why I should not be called into the case. Q. What was this case that you were to be called in? A. I didn't know what the case was. I was informed that there was a case on trial affecting Mr. Sumner's interest, I didn't know what it was. I was requested to appear, I think it was in the afternoon, about 1:30 I received the message from Mr. Davis, verbal message from Mr. Lightfoot,—I had not seen Mr. Davis,—to the effect that I was to be called into the case to assist him. I didn't know anything about the status of the case at that time. I didn't want to take it, I didn't want to take hold of it without referring to Mr. Humphreys to see if there was any objection to my going on. Q. Going on into the case? A. Going on into the case. I telephoned him to know if there was any reason, because of the matters we had talked about, against my going into the case. He said he had no objections whatever, that was over the telephone. I came into the court room here and sat beside George A. Davis and he made a request accordingly to enter me as associate counsel with him. That was before Judge Robinson. I declined and said I would only sit there during the afternoon and prompt him as to certain matters within my knowledge and that I would decide whether I would come in the case later. Q. Who was conducting the case on the other side at that time? A. Mr. Highton and F. E. Thompson were conducting the case. Q. What was that case? A. Next morning I looked at the records and found out that it was the application or effort of Mrs. Maria S. Davis to put Mr. Sumner under guardianship

as a person *non compos*. I didn't know that until I looked at the record next morning."

The second attitude is illustrated in the evidence of the same witness testifying about a power of attorney executed to himself, at a later date than either of the events above referred to, as follows:

"Q. Had Mr. Sumner at any time executed a power of attorney to you? A. I think that he executed a paper to me about that same time, a little prior to that general power of attorney. Q. Well, what was it? A. A special power of attorney, authorizing me to do certain things for him. Q. What, for instance? A. I cannot remember. Q. Did it authorize you to sign checks? A. I don't remember the contents of the power of attorney. Whatever my action was it was to be approved by some other persons. I didn't have any power to do anything of my own accord. Q. Who was the person? A. R. W. Davis. Q. Wallie Davis was a client of yours? A. I don't know whether he was particularly. Q. Can you say—can't you say whether he was or not, particularly or unparticularly? A. I don't know what proceedings he was a client of mine in. A. You can state whether he was a client or not. A. I have done work for him. I have had no retained. When he had things to do he has come to me and to George A. Davis, I don't know that he was a client of mine. Q. Have you the power of attorney now? A. I have not. Q. Can you say what has become of it? A. It was returned to Mr. Sumner. Q. When? A. I don't know. Q. Didn't you return it to Mr. Sumner after you found out I knew you had it? A. I don't know. Q. I ask you whether or not this power of attorney authorized you to sign checks in Sumner's name? A. I think not. Q. What did it authorize you to do? Being the subject you must have some recollection as to its contents. A. I think it was in contemplation of Mr. Sumner going to Tahiti, he left me power to act upon request or approval of Mr. Davis. Q. Did you—act in what matters? A. In all his matters. Q. Then it was a general power of attorney? A. No, I could invest his money for him. Q. So that he didn't desire to take his money to Tahiti, he proposed to leave it here for you to invest? A. No, he wanted to take some of it and the rest he wanted to leave. Q. How can you name one single thing you were authorized to do by that power of attorney? A. No, I don't remember

any special thing—to attend to his business except—certain of his business, subject to the approval of Mr. Davis. Q. You say certain of his business, you must remember what business it was. A. To invest his money, as I remember. Q. To invest his money you would have to release mortgages, to invest money you would have to foreclose mortgages, let me refresh your memory to that extent; what other power did Sumner in this power of attorney confer upon you other than investing money? A. I don't remember, I think collect rents and invest his money. That is all. Q. You have stated you could not recollect anything and you subsequently stated, to collect rents. Can't you state something further as to the particulars of what it was? A. I don't remember. Q. Bring suits? A. I think so, yes. Q. Defend suits? A. I think so, yes. Q. Deposit his own money in your name? A. I don't remember anything said with reference to that. Q. Was there anything said in the power about the disposition of money after you had collected it? A. I don't remember. Q. Was your commission fixed? What warrant of attorney? A. I think so. Q. You think it was? A. Yes. Q. How much? A. I think it was 5% on the gross income. I don't remember distinctly. The power of attorney was returned. I am giving it to the best of my remembrance. Q. Occurred last October? A. Yes."

It is absolutely impossible for me to believe the testimony of Mr. Magoon when he swears that he "sat beside Geo. A. Davis," attorney for the petitioner, for one entire afternoon "and prompted him" and still did not know whether the cause on trial was a suit in equity to restrain the sale of land or an action in probate to declare John K. Sumner *non compos mentis*, until the "next morning" when he looked at the record "and found out that it was the application or effort of Mrs. Maria S. Davis to put Mr. Sumner under guardianship as a person *non compos*. I didn't know that until I looked at the record next morning." In this instance Mr. Magoon either was mistaken as to his knowledge or he swore falsely. In either event his credibility with me is very much weakened and I cannot feel sure that he is not mistaken or is not falsifying in his story about the respondent "attempting to persuade" him to betray his client.

It may not be improper in this connection to state that notwithstanding the many insinuations made in the opinion of the court against the credibility of the respondent, Humphreys, I do not recall a single instance in the entire record that in any way approaches so near to a demonstration of the unreliability of his testimony as the above incident does that of J. Alfred Magoon.

Again if Mr. Magoon is to be believed he entertained the proposition made to him by the respondent to the extent of submitting it to this client and the venture was not successful for the reason that the client rejected it. Does this not make J. Alfred Magoon equally guilty with the respondent? Under the law the seducer and the seduced are equally infamous. (*In re Cowdery*, 69 Cal. 32 and *In re Whittemore*, id. 67.)

Will justice be done in this case by disbarring the respondent and by giving Magoon a certificate of character for the virtuous indignation he did not show when approached by the tempter? Not by the standard announced by the Supreme Court of California in the cases above cited.

In concluding this discussion I feel justified in stating that I would not convict a cat of stealing cream on the evidence offered in support of this individual charge against the respondent, Humphreys, much less pronounce judgment of disbarment against an attorney who has spent the best years of his life in qualifying himself to adorn the profession, who has heretofore borne an honorable name in the community, and who has been entrusted with high judicial position in this Territory by the President of the United States.

It would be useless to state what punishment to me would seem proper under the charge that has been proven against the respondents but I will state that, in my opinion, the judgment of the court against the respondent, Thompson, is unnecessarily severe and that against the respondent, Humphreys, is not justified by the law or the evidence.

IN THE MATTER OF GEORGE A. DAVIS, An Attorney
at Law.

ORIGINAL.

SUBMITTED JULY 30, 1903. DECIDED AUGUST 10, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

It is gross misconduct, meriting disbarment, for an attorney to impede and delay a settlement satisfactory to a client solely for the purpose of securing an extortionate fee from some one, in a case brought by such client for the purpose of protecting an aged, weak-minded relative by placing him under guardianship, and to abuse the process of the courts in order to compel such weak-minded, aged man, who has a dread of litigation, to purchase his peace by paying a large sum of money even though it be for the benefit of a client, and to compel such aged man by means of threats and intimidations to pay a fee substantially larger than he was willing to pay.

OPINION OF THE COURT BY PERRY, J.
(Galbraith, J., dissenting.)

On August 4, 1902, the Oahu Railway & Land Co. filed in the Circuit Court of the First Circuit at Chambers a bill for the specific performance of a certain covenant contained in a lease executed February 7, 1895, by J. K. Sumner to B. F. Dillingham and Mark P. Robinson and subsequently assigned by the lessees to the Oahu Railway & Land Co. That lease was for ninety-nine years and the covenant just mentioned was that Sumner would at any time within the term of the lease at the option and request of the lessees or their assigns sell and convey to them for the sum of \$100,000 all of the demised premises, being certain property fronting on Honolulu Harbor,

excepting only a reservation by the lessor for a term of 25 years, from the date of the lease, of a certain portion 50,000 square feet in area. Those named as parties respondent in that bill were J. K. Sumner and the Right Rev. Gulstan F. Ropert, Bishop of Panopolis, the trustee named in a deed of trust executed September 17, 1898, by J. K. Sumner conveying all of the grantor's property in the Hawaiian Islands subject to certain trusts therein named. This is the deed of trust which was the leading subject of discussion in *Ropert v. Sumner*, *ante* p. 76, which see. In the suit for specific performance service of summons was made on the Bishop on August 5, 1902, and on Sumner on the 22nd of the same month.

On September 4, 1902, no judicial proceedings having in the meantime been had in the suit for specific performance other than to grant to the respondents extensions of time to plead, answer or demur, Maria S. Davis, the sister of Sumner, filed in the Circuit Court of the First Circuit a petition for the appointment of a guardian of the person and property of Sumner, alleging in the petition, *inter alia*, that Sumner "is of unsound mind and has been for several years past and has been and is unable to transact any business or in any way care for and control his property," and "is an insane person within the meaning of the statute" and "is utterly incapable of and unable to care for and manage" his property. Later in the same day, to wit, at midnight, a bill in equity was filed, entitled "John K. Sumner, by his next friend Maria S. Davis, Plaintiff, v. Oahu Railway & Land Co., a Corporation, and the Right Reverend Gulstan F. Ropert, Bishop of Panopolis, Defendants," in which it was prayed that the Oahu Railway & Land Co. be restrained from purchasing and the Bishop from conveying any of the property of Sumner and that the lease of February 7, 1895, and the trust deed of September 17, 1898, be set aside and declared null and void. The substantial averments of the bill upon which the prayer for relief was based were that Sumner "is insane and was insane" at the time of the execution

of the lease and trust deed and that the lessees well knew at the time that Sumner was of unsound mind, that for these reasons the two instruments were absolutely null and void, that the respondents had agreed to settle the suit for specific performance and were about to convey to the Oahu Railroad Company the land sued for, that Sumner "is also incapable of entering into any contract and is at present of unsound mind" and that the officers of the Railroad Company "well know that the said J. K. Sumner is insane," and that unless the respondents were restrained by injunction the conveyance would be made.

Upon the filing of the bill Maria S. Davis was appointed next friend of Sumner and authorized to prosecute the suit and a temporary injunction was issued as prayed for. On September 19, 1902, Sumner intervened and moved to dismiss the bill on the ground that he was sane and entirely competent to care for his property and on September 24 after a hearing as to Sumner's sanity based solely on affidavits the motion was granted and the bill dismissed. The complainant filed a notice of appeal.

In the guardian case Sumner filed an answer on September 6 denying the allegations as to unsoundness of mind and an answer to the same effect on September 19. The case thereafter went to trial, testimony as well as written evidence being adduced, but before the trial was concluded a consent decree dismissing the petition and declaring Sumner *compos mentis* was, on October 13, 1902, at the request of the attorneys, or one of them, of Maria S. Davis and those of Sumner, signed. On the same day a deed conveying to the Oahu Railway & Land Co. for the sum of \$110,000 all of the land sued for and also the reserved portion free from the lease was executed by Sumner and the Bishop and joined in by Maria S. Davis, her son R. W. Davis, John S. Ellis, William S. Ellis and Victoria Buffandeau, *nec* Ellis, and the spouses of the three Ellises and the appeal in the injunction suit was withdrawn. The suit for specific performance was likewise discontinued on the following day.

The termination of these various proceedings and the execution of the deed were by virtue of a settlement reached by all of the parties concerned, the terms of which were, in part, that the Oahu Railway & Land Co. should pay to Sumner for the property conveyed \$110,000 and that Sumner should pay to each of the three Ellises \$10,000, to the Catholic Church \$10,000 and to Maria Davis \$10,000. The respondent was also to receive a fee of \$5,000 for his services and those of his associates in the guardianship and injunction cases, Magoon & Peters, and other attorneys were likewise to receive certain amounts as fees. Further than this the terms of the settlement and by whom and by what methods it was negotiated or reached are matters which will be treated of hereafter in so far as it may necessary to do so.

On October 27, 1902, Bishop Ropert filed a bill in equity praying for the appointment of a new trustee in his place under the deed of trust of September 17, 1898, and alleging that the sum of \$48,000, being the balance of the proceeds of the sale to the Oahu Railway & Land Co. remaining after the payments made according to the terms of the settlement, had been by him paid over to Sumner under the impression that it was Sumner's property and by Sumner deposited in Bishop & Company's bank. That proceeding resolved itself finally into a contest between Sumner on the one side and the Ellises on the other as to whether the fund was the property of Sumner free from any trust or was still subject to the trusts declared in the deed of September 17, 1898. From its institution the firm of Magoon & Peters represented Sumner but commencing with the first day of December, 1902, or some day shortly thereafter, and until its termination in favor of Sumner on September 26, 1903, the respondent also appeared for Sumner.

The matter now before us is an information by the Attorney General charging the respondent, a duly licensed attorney of this court, with professional improprieties and malpractice in the proceedings briefly outlined above.

The first charge is that the respondent on or about September 2, 1902, procured himself to be retained as attorney for Maria S. Davis and instigated and advised her to institute the guardianship proceedings; that on or about October 12, 1902, Sumner and Maria S. Davis agreed to compromise and discontinue that case on the payment by Sumner to Maria S. Davis of the sum of \$10,000 and that Maria S. Davis notified the respondent of her intention to so settle and discontinue the case; and that the respondent, though claiming to act as her attorney, refused to settle and discontinue the case unless he was paid the sum of \$5,000 and threatened to prevent such settlement and discontinuance or to take any steps to so settle and discontinue unless and until arrangements were made whereby he, the respondent, should receive the sum of \$5,000 as counsel fees.

In the information it is alleged that Sumner was a man of upwards of eighty-four years of age, with little or no knowledge of business or the value of money, and by reason of his great age and lack of knowledge, was easily influenced and controlled, and that all of these facts were well known to the respondent.

The second charge is that on or about December 1, 1902, the respondent falsely represented to Sumner and to one R. W. Davis that he, the respondent, could immediately obtain for Sumner the sum of \$48,025 at that time deposited in Bishop & Co.'s bank, if Sumner would pay him \$3,000 for his services in obtaining the money and that respondent knew such representations to be false, that by means of such false representations he persuaded and induced Sumner to give him a promissory note for \$3,000 payable on demand and reciting that it was for value received, that no value had then been given for the note, and that Sumner, misled by the respondent's misrepresentations, believed that the note was necessary to insure the obtaining immediately of the \$48,025 and that upon respondent's failure to obtain the money the note would have no value

or effect; and that the respondent, although he failed to obtain the money, kept the note and refused to return it.

Third charge: that the respondent procured himself to be appointed as one of the attorneys for Sumner in the case of *Ropert v. Sumner* and acted as such; that on June 25, 1903, that case was finally decided by the court and that the decree was that the \$48,025 be paid to Sumner; that on or about June 26, 1903, the respondent, well knowing Sumner's weakness and inability to understand financial matters, threatened Sumner that unless the latter should pay him a fee of \$2,500 for his services in *Ropert v. Sumner*, he would sue Sumner on the \$3,000 note and would garnishee the \$48,025 and further tie up that money; and that by means of such threats and intimidations and preying upon the fears of Sumner, who, as respondent knew, had great dread of litigation, the respondent extorted from Sumner the sum of \$2,000.

1. The allegation that the respondent procured himself to be retained by Maria S. Davis as her attorney in the guardianship case, is not sustained by the evidence. On the contrary, the testimony of R. W. Davis, the only witness produced and examined by the Attorney General on the subject, is that, at the request of his mother, Maria S. Davis, he sought the respondent and engaged him.

As to the remainder of the first charge we find the following as facts: A day or two prior to September 4, 1902, Maria S. Davis, the sister of J. K. Sumner, having learned of the institution of the suit for specific performance and that the Ellises had engaged counsel and were to receive some large sum, either \$50,000 in all or \$25,000 apiece from Sumner out of the proceeds of the land, sent for and employed the respondent to protect her brother and incidentally to represent her. On the 4th of September, at the respondent's request, Mrs. Davis and her son went to the office of the respondent and there the latter, who had already prepared the petition in the guard-

ianship suit, explained that the suit was one to have Sumner declared *non compos mentis*. Mrs. Davis asked what those words meant and her son replied that they meant insane or crazy. Mrs. Davis did not like the idea and objected, but upon the respondent advising her that that was the only way to bring the suit yielded and consented to its institution. About the midnight following, the petition in the injunction suit, signed and sworn to by the respondent himself, as was the first petition, was filed, but whether with or without Mrs. Davis' express consent or knowledge does not appear. It may be assumed for the purpose of this case that it was with her knowledge and express consent. After the injunction suit had been resisted on affidavits and dismissed and after the guardianship suit had been on trial for several days and Sumner himself had been on the stand one whole day and parts of two other days, Sumner, who is a man 84 years of age and who has been involved in much distressing litigation (see decision *In re A. S. Humphreys and F. E. Thompson* filed this day) during the period of eight years last past and has a great dread of litigation, worried and wearied beyond endurance, called on his sister then living on Sumner Island, and told her of his aversion to court proceedings and that he wished to be freed of all the pending litigation and make the sale to the Oahu Railway & Land Co. and return to Tahiti, and said that he wished to give her, to each of the Ellises and to the Catholic Church \$10,000 each, and asked her if she would discontinue the proceedings. His sister replied that she was willing to do so, that that case, like all other proceedings she had ever brought against him had been brought merely to protect him and not as demands for money, but that if he wished to give her money, it was his to give and he could do as he pleased about that. She agreed to the settlement. R. W. Davis then went to the respondent and informed him of what had occurred. The respondent refused to agree to the settlement unless there was some definite arrangement about his fee and

said he wanted \$5,000. R. W. Davis said that would leave his mother only \$5,000, and, finally, that he would go and see his mother about it. Mrs. Davis refused to agree to pay the amount demanded and R. W. Davis so reported to the respondent, whereupon the latter said he would see about it. While R. W. Davis was at respondent's office on this occasion, Mr. F. E. Thompson, representing Sumner, entered and talked to the respondent about the settlement. The respondent said: "That's all right about the settlement, the settlement is all right. What about my fee? I want to know something about my fee." Thompson said that Sumner refused to pay anything toward the fee. Respondent said, "I won't allow the settlement to go on unless there is something definite about my fee." After Thompson left, respondent said to R. W. Davis that he was going to see Mr. Dillingham of the Oahu Railway & Land Co., left the room apparently for that purpose, had an interview with Mr. Dillingham, and shortly afterwards returned and said that the Railway officers would have a meeting that night to consider the question of his fee and that the answer would come in the morning. The next morning respondent told R. W. Davis that the Oahu Railway & Land Co. had agreed to pay \$5,000 extra to cover his fees, making a total price of \$110,000 for the land. From that time on there was no further impediment to the negotiations for settlement, so far as the respondent was concerned, and the settlement was very soon consummated in the manner above stated. Mrs. Davis received \$10,000 and the respondent \$5,000 out of which he subsequently paid his associates, Messrs. Magoon & Peters, \$2,500. In brief, the respondent attempted by impeding and delaying the proposed settlement to secure for himself either from Maria S. Davis or from Sumner or from the Railroad Co. a fee of \$5,000.

We have found these facts against the denial of the respondent that he ever refused to agree to the settlement or to discontinue the proceedings. His version of the matter is in brief as follows: that at the first interview with Mrs. Davis at which she employed him as her counsel he was informed

that the Ellises were about to receive \$50,000 and the Catholic Church \$25,000 from Sumner and that Sumner himself was to take the balance of \$25,000 to Tahiti; that in great haste and by dint of much work he at once prepared the guardianship and injunction suits and instituted them for the purpose of preventing the distribution just mentioned and in order to secure from Sumner for Mrs. Davis some of the money. "In other words, I was not going to allow the horse and carriage to go out of the barn before locking the door and run away and smash the whole business, for I knew that the minute that they got the \$100,000 and divided it up would be the last. I didn't wait but I worked all night. * * * * If the property had been sold and the money had been divided, Maria S. Davis, his own sister, would not have got a cent. That is the reason I instituted those proceedings in equity and the reason I filed the guardianship suit." * * * "Q. Then you were not protecting the interests of Maria S. Davis but of John K. Sumner in this suit? A. Well, I don't know what you call it, because if that land had been sold and the money divided as I detailed already yesterday in my evidence, the money would have been divided between the Ellises and the Roman Catholic Church and Maria S. Davis would not have gotten a dollar and she was an heir of Sumner." In his closing address to the court the respondent reiterated and insisted, as though his action were something laudable, that he had brought the two suits in order to obtain money from Sumner for Maria S. Davis and that he succeeded in getting \$10,000 for her. Proceeding further with the respondent's version, his testimony is to the effect that Mr. Dillingham asked him if the matter could not be settled, and thereupon he, the respondent, asked and obtained authority from his clients to negotiate for a settlement. "I said" to Mrs. Davis and R. W. Davis, "You are afraid that Sumner will dispose of all his property before he dies, will divide it up and that you won't get any; now, if the old man is going to give you what is fair and right, are you willing to do it?" She said 'Yes.' " He goes on to say that he did nego-

tiate and finally succeeded in obtaining \$10,000 for his client and \$5,000 as a fee for himself. Just what the negotiations for that \$10,000 consisted of he does not say, but he does testify very clearly as to the negotiations for the \$5,000, to the effect that he went to Mr. Dillingham,—this, upon all the evidence, was at a time when in all other respects the terms of the settlement had been agreed upon by all the parties and when the Railroad Company was willing to pay and Sumner was willing to receive and accept the sum of \$105,000 in full for a conveyance of all the property finally conveyed, and when all, other than the respondent and possibly, though we do not so find definitely, his associates, were willing to close the matter on that basis—and said to him, “The proper way for you to get a title to this land and the proper way to settle this suit is to get all the living heirs of Sumner to join in a deed to the Oahu Railway. ‘Now,’ I said, ‘You can afford to give a few thousand dollars more so that Maria S. Davis can have the things fixed up. I have gone to all this work, I have instituted these proceedings of guardianship,’ I had gone on with an immense amount of labor in connection with it, I had filed this, appealed this equity case to the Supreme Court, and I said, ‘I have hired Magoon & Peters and they have got to get paid, and I think I have earned, Mr. Dillingham, \$2,500 and I think Mr. Magoon has earned \$2,500, so that if you will add \$5,000 on to what you have already agreed to settle for, I will advise my clients to settle,’ and he said he would.” In other words, if the respondent’s testimony is to be believed, we are compelled to find, first, that the respondent, whether the idea was first suggested by his client or originated in his own mind, brought the two suits, not for the purpose of proving the allegations that Sumner was of unsound mind and incapable of caring for his property or of obtaining a decree to that effect and having a guardian appointed for him or his property or of preventing the threatened execution of an invalid deed and the impending dissipation or loss of his property, these being the legitimate and expressed objects of the proceedings, but for the ulterior

purpose of extorting money from Sumner; second, that after wearying Sumner by the litigation into a condition of mind where he was willing to buy his peace for a substantial sum of money he entered into negotiations with him and brought about a settlement on the basis of Sumner's paying his sister \$10,000; and, third, that, keeping his object consistently in view and well knowing the anxiety of the Oahu Railway & Land Co. to acquire the land, he then gave that company to understand, in mild and polite words though it may have been, that in order to secure a conveyance to the land which the owner himself was willing to give for \$105,000 the company would have to pay \$5,000 more to cover the amount of the respondent's fee and practically blackmailed the company into paying that amount. If the story of the respondent is true, and we believe that it is in so far as it relates to his own purpose, as distinguished from that of his client, in bringing the suits, to his consistently keeping that object in view, to his success in producing the necessary condition of mind on the part of Sumner, and to his black-mailing the Railroad company to the extent of \$5,000, then he has been guilty of gross misconduct, more flagrant and serious even than that proved against him by the other evidence in the case.

The position in which the respondent has placed himself by his own admissions renders it unnecessary, perhaps, to set forth any of the reasons for our accepting as true and relying upon the testimony of R. W. Davis as a whole and more particularly at points where it is in conflict with that of the respondent; and yet, in view of the nature of the case and the serious consequences to the respondent of a finding of guilty, we shall refer, to some extent, to the subject. In the first place, that witness while on the stand impressed us as being truthful. His appearance, attitude and manner of testifying all conduced to that impression. He seemed to be careful not to overstate matters against the respondent and testified without hesitation and without reserve to facts in the respondent's favor, as, for example, in disproving the charge that respondent had pro-

cured himself to be employed as counsel for Maria S. Davis. He exhibited no feeling of hostility against the respondent. No adequate motive for his perjuring himself or deliberately making up a case against the respondent appears or has been suggested. Many opportunities presented themselves for his establishing an even stronger case against the respondent if he had felt inclined to do so. The present proceedings were not in any manner instigated or even suggested by him or his mother or Sumner, but were instituted, as we well know, solely because of and in compliance with the direction of this court to the Attorney General. (Parenthetically, we may say that that official does not deserve any of the abuse so freely heaped upon him by the respondent at the hearing and in his closing address. Mr. Andrews did not move against the respondent until he was directed by the court to act.) Such corroborating evidence as there is at disputed points corroborates R. W. Davis and not the respondent, as, for example: the respondent testified that Mr. S. M. Damon in refusing at the bank to pay the check for \$28,025 hereafter referred to gave as a reason that the check did not bear J. A. Magoon's O. K. This was material in view of respondent's claim that he had not known such O. K. was necessary and that he did not sue the bank for the money because Magoon refused to O. K. Mr. Damon and R. W. Davis both testified that that was not stated as a reason by Mr. Damon. Likewise, the respondent denied having sought employment by Sumner in the case of *Ropert v. Sumner*, R. W. Davis said he did, and J. A. Magoon, whose credibility will be referred to later, testified,—and he was not cross-examined or contradicted on the point—that some time prior to the respondent's entering the case he, the respondent, had suggested to him, Magoon, that he be retained and asked him to speak to R. W. Davis about it. Moreover, on the precise question as to whether, as the respondent claims, Mrs. Davis and R. W. Davis authorized him to institute and conduct negotiations for a settlement which led up to and resulted in the \$10,000 payment, or whether, as R. W. Davis testified, the offer came from Sumner to his sister

and was by her acquiesced in and then reported to the respondent, the probabilities greatly preponderate in favor of R. W. Davis' story. Mrs. Davis is 77 years old and at best her remaining years are not many. She has on several occasions brought similar proceedings for the protection of her brother and never for profit. Until the case under consideration she never received or asked for money for purposes of settlement. It is not at all likely that now so late in life her character has changed for the worse. Sumner on the day of the settlement left the Ellises with whom he had been living and took up his residence with his sister. They were on the very best of terms. Is it at all likely that this would have been so if the offer to settle for cash had come from his sister,—if, in other words, he had been openly made by her to pay for his peace? In view of the immediately succeeding friendly relations, is not the statement that Sumner first went to Maria and offered to give her as well as each of the Ellises and the church \$10,000 by far the more probable and natural? We think it is. That Sumner's willingness to make the offer may have resulted or did result from his worried condition of mind caused by the suits advised by the respondent does not in any degree militate against this view.

We deem it an aggravating circumstance, whether with reference to the finding based on the testimony of R. W. Davis or with reference to one based on the respondent's own version, that the amount of the fee demanded and obtained was grossly excessive, and this, too, even assuming, what is not the fact, that the respondent brought and conducted the two suits in good faith and for legitimate purposes. The issue upon which the injunction suit was disposed of was raised by a motion by Sumner to intervene and dismiss the bill and was simply whether Sumner was sane or insane within the meaning of the statute. No oral evidence was taken; the issue was decided upon affidavits, one only being filed on behalf of the complainant. The hearing upon the motion occupied but one day, the decision being rendered two days later and the decree filed on the next

day. In the guardianship case there was a simple petition alleging unsoundness of mind and an answer by Sumner denying the truth of that allegation. Upon that issue a trial was commenced before Circuit Judge Robinson on September 29, 1902, continuing until the next day at noon at which time the case was transferred to Circuit Judge De Bolt. The trial before Judge De Bolt occupied the first, second, third and eighth days of October, on six other days counsel appeared in court and continuances were ordered and on the 14th of October the consent decree was filed. It is unnecessary to say definitely what fees the respondent and his associate firm would have been justified in charging for these proceedings in court and for all other necessary work done in connection with the suits and their settlement. It is clear beyond any doubt that the charge of \$2,500 for each of the attorneys is grossly excessive.

2. We find upon the evidence that the respondent did seek to be employed as an attorney for Sumner in the case of *Robert v. Sumner*. Respondent denies this, but we believe the evidence of J. A. Magoon and R. W. Davis on this point to be true. That evidence shows that at some time prior to December 1, 1902, the respondent suggested to Mr. Magoon, who was then Sumner's attorney, that he, respondent, be retained in the case and asked him to speak to R. W. Davis and did so but no employment resulted from that attempt. Later, on or about November 30th, the respondent approached R. W. Davis on the street and said to him that the bank had no right to hold that money, that the case was not being properly conducted, that he could get the money out in twenty-four hours and that if it was not out in that time he would sue the bank. R. W. Davis reported the conversation to Sumner with the result that the latter invited respondent to come out to his house to see him about the matter. The respondent did so, on the first of December, a notary also attending at the respondent's suggestion. The respondent had with him already prepared and at that interview procured the execution of a note reading, omitting the date and signature, "On demand for value received

I promise to pay Geo. A. Davis or order the sum of three thousand dollars at the Banking House of Bishop & Co., Honolulu, without interest," and also a power of attorney authorizing the respondent to act as counsel for Sumner "in all suits and actions in equity and at law now pending in the courts of the Territory of Hawaii and especially in the suit in equity now pending between the Bishop of Panopolis, plaintiff, and John K. Sumner, defendant, the plaintiff praying to be discharged as trustee" and to take all steps "necessary to obtain possession of the sum of \$48,025 now on deposit in Bishop's Bank" and appointing him Sumner's "attorney in fact as well as of record to represent me in all litigation and to collect and receipt for all monies due or to become due me in this Territory and to bring actions at law or suits in equity to obtain judgments and decrees for the purpose of establishing my rights" and containing an agreement by Sumner to pay him \$3,000 "for his services at any time when he may demand the same." The respondent testified, and so also did the notary, that the power of attorney was read and carefully explained to Sumner and R. W. Davis and that R. W. Davis translated it into Hawaiian for Sumner's benefit, and the respondent claims, in his testimony and in argument, that the power of attorney was intended by him to be what it purports on its face to be, namely, a grant of authority for the respondent to appear as Sumner's attorney throughout the Ropert case and that it was not intended solely as authority for the immediate collection of the \$48,025 from the bank and that likewise the note was intended to secure the payment of fees for services to be rendered in the whole litigation and not only in case of immediate recovery of the money. Let it be assumed for the purposes of this case, without so deciding, that, so far as the intention and understanding of the respondent at that time are concerned, these are the facts and that he did not procure either of those instruments by fraud. Sumner and R. W. Davis testified that the understanding and agreement at that time were that the power of attorney and the note were to apply to the immediate collection, that

Sumner did not intend by virtue of what was said and done that night to employ respondent as his attorney in the Ropert case (Sumner does not in any way deny that the respondent subsequently *acted* as his attorney in the Ropert case and in a characteristic way paid him at the close of the case on the supposition that perhaps Magoon or R. W. Davis had called him in) and that the note was to be of no force if the money was not at once collected from the bank. Indulgence in the above assumption does not require us to hold that the testimony of Sumner and R. W. Davis was therefore false and while the respondent, as assumed, may have had the understanding above mentioned and may have been guilty of no fraud in procuring the execution of the note or of the power of attorney in form as signed, yet it may also be, and we believe that this was the fact, that R. W. Davis understood the matter as testified to by him and that Sumner also so understood it or else had no clear understanding on the subject at all. Neither in this nor in any other branch of the case do we rely to any great extent on Sumner's testimony—this owing to his weakness of mind and memory; but aside from this there is ample evidence to show that the circumstances were such that R. W. Davis' and Sumner's understanding may well have been as claimed by them. The power of attorney is in the respondent's handwriting and R. W. Davis testified that he was unable to read it very well. That is not difficult to understand. The Hawaiian translation under such circumstances could not have been of much value. The notary, after testifying to the careful reading and explanation of the power of attorney, yet said that the impression that the respondent left upon his mind by what he said that night was that he would get the \$48,025 out of the bank very shortly,—“that if he didn't get it the next day he would know the reason why.” The respondent had told R. W. Davis and through him Sumner that the money should have been out long ago and that the pending suit was not being conducted in the right way. That could well have been understood to mean that the respondent was to apply some new

method of relief. The respondent himself testified that he told Sumner that the note was not to be paid until the case should be completed, that he would not charge as much as \$3,000 unless the services rendered should merit compensation to that amount and that 'You have got to trust me, I am your lawyer and I will do what is right with you at the close of the case.' In the light of these circumstances is it to be wondered at that Sumner and R. W. Davis believed that the written instruments were largely matter of form and that they were not all that they purported on their face to be but meant something different? It may be added that Sumner's and R. W. Davis' failure to demand a return of the note is explained by the fact that the respondent said to R. W. Davis immediately after the attempt to collect the check that he would keep the note because he was going to sue the bank.

3. The decision of this court in the Ropert case, declaring the \$48,025 to be the property of Sumner free from any trust, was rendered June 25, 1903. Sumner and R. W. Davis at the time were in Koolau but were promptly notified of the result and asked by Sumner's attorneys to come at once to Honolulu. In pursuance of that request they went to the house of J. A. Magoon, arriving at about 8:30 o'clock p. m. and there finding respondent and Magoon. Respondent introduced the subject of his fee. He said that he wanted his fee adjusted and settled, that the note was for \$3,000 but that he would ask only \$2,500. Sumner said that that was too much and that \$1,500 would be ample and offered that amount. Respondent said he had worked very hard all through the case, that he ought to have \$2,500 and that he would not take less. Respondent insisted upon the amount named and Sumner stubbornly declined to pay it. As Mr. Magoon said on the stand, "there was a good deal of talk there that evening. I think Mr. Sumner stayed about half and perhaps three quarters of an hour or may be longer, I don't know, I know it was a long time, and Mr. Davis and Mr. Sumner were talking about the thing backwards and forwards, Mr. Davis urging it and Mr. Sumner declining to

pay it and said that he would not pay more than \$1,500.” “Davis got mad,” R. W. Davis testified, and his testimony in this respect remains uncontradicted. The respondent said to Sumner that he had an attorney’s lien for his fee, that the money could not be obtained from the court unless his fee was first paid, and that he would prevent its being paid out of the court unless Sumner should agree to pay \$2,500. Sumner held out however and finally left. The following morning Sumner and R. W. Davis met the respondent at Magoon’s office. The fee was again talked of. The respondent continued to demand \$2,500 and Sumner still held out for \$1,500. The respondent, holding a paper in his hand and “shaking it,” said that he would garnishee the money. “I will stop the money, I will garnishee, that money shall never be paid until I get my fee. I will tie that money up in the bank.” Sumner and R. W. Davis then spoke to each other for a few moments in Hawaiian and finally Sumner offered to pay \$2,000. This the respondent at once accepted and the parties thereupon appeared before the Circuit Judge and there a check for \$2,000 in respondent’s favor was signed by Sumner and the fund in the custody of the court was paid over to him.

We are satisfied from the evidence that Sumner’s final consent to pay \$2,000 was due solely to the respondent’s manner and undue insistence and to his threats to “tie up” the money and was reluctantly given in order to avoid the delays and the annoyance of further litigation. That the respondent at that time well knew that the man he was dealing with was weak-minded and easily influenced, is indisputable. In his answer in this case he specifically admits the truth of the allegation in the information “that the said J. K. Sumner was a man of upwards of the age of 84 years with little or no knowledge of business, or the value of money, and by reason of his great age and lack of knowledge was easily influenced and controlled, all of which facts were well known to said Geo. A. Davis.” In the decision then just filed, this court, unanimous on that point,

had held that Sumner was weak-minded and easily influenced. The petition for guardianship, the main allegations of which have been already recited above, was sworn to by the respondent himself, and not on information and belief; and in the injunction suit, in support of an application for the appointment of Maria S. Davis as next friend of Sumner, the respondent swore "that he has a personal knowledge of the facts herein deposed to and that the facts and statements herein contained are just and true," and one of the allegations thus deposed to was that Sumner "is a person of unsound mind and has been insane for a long period of time." The respondent well knew, too, of Sumner's dread of litigation.

The respondent contends that the fee of \$2,000 was intended to cover future as well as past services. We believe this to be entirely an after-thought and that at the time the amount of the fee was adjusted and paid it was neither the intention nor the understanding of the parties that all or any services to be thereafter rendered by the respondent were being included or paid in that fee. If future services, what future services? In all cases then pending in the courts, or in all cases pending or to be instituted relating to Sumner's sanity, or in all cases relating to the \$48,025, or in all cases of whatsoever nature and whensoever brought? There is nothing in the evidence to show any understanding between Sumner and respondent on these points. It is true that *after* the respondent had been paid the \$2,000, Mr. Magoon asked him, "Does not this include—you will help me out in the guardianship proceedings that are now before the court, will you not, Mr. Davis?" and respondent answered, "Oh, yes, I will, call on me when you want me," but from the respondent's own evidence this appears to have been due, not to any contract obligation, but to a feeling on the respondent's part that he had already gotten enough out of Sumner. "\$2,000 is a great deal of money," he testified. "Indirectly, I have got \$4,500 out of the Sumner business, and I don't consider that I ought to take any more. Directly and in-

directly, it arose out of it. I do feel that I ought to help. I got \$2,500 from Maria S. Davis, I got \$2,000 from the old man, that is \$4,500, but I think I ought to assist him to get out of trouble as far as I can." But it is not what respondent now thinks or has thought *after* the \$2,000 was paid that is to be considered in this connection, but what the understanding between the parties was in paying and receiving the fee. It is clear from the evidence that all that was mentioned or considered while the amount of the fee was being discussed was *past* services. "I *have worked* hard," the respondent said,—not, 'I have also much work yet to do.' "Can't we make a settlement?" the respondent asked. "I want to get my money and I want to wash my hands, Mr. Sumner, of your transactions;" and before Judge De Bolt, after the check was signed, "Sumner, here is your note for \$3,000, you have paid me, *we are quits*, that is satisfactory." As if more were needed, an entry dated June 26, 1903, made by respondent by way of receipt in Sumner's cash book, reads, "To cash paid me this day in full [(Sgd.) Davis] \$2,000." That is not a receipt for future services.

The past services were the futile attempt to collect the check on the bank and the preparation of a declaration for an action, which was not filed, against the bank, those rendered in the Ropert case, in the W. S. Ellis petition for guardianship and perhaps in one or more matters of minor importance, not specified. The services in the Ellis guardianship case consisted simply in resisting a motion for a restraining order. The trial in the Ropert case began on December 17, 1902, and was continued on December 26, 27, 30 and 31, and January 2, 3, 5, 6, 8 and 9 and other proceedings in it were had on December 18, 22 and 29 and January 2 and 3, and 14. The appeal was argued in this court on March 2 and 3, and June 16, and a motion to advance was presented on another day. The pleadings, briefs and other papers filed in the case make up quite a voluminous record, with all of which we are quite familiar. In our opinion the fee of \$2,000 was excessive—it is unneces-

sary to say to what extent. And the fee demanded, \$2,500, was still more excessive. We regard this merely as matter of aggravation in connection with this charge, the gist of which is the respondent's method in obtaining the fee rather than the amount of the fee.

Still the evidence requires the finding on this charge, and we make it, that the respondent, by means of threats and intimidation and taking advantage of the mental infirmities of Sumner, caused the latter to pay him a fee substantially larger than Sumner was willing to pay. An announcement of an intention to sue to recover the fee or to garnishee the bank or other trustee or debtor to the extent of the amount claimed, might, if it had stood alone, have been proper and excusable but the respondent went much further.

A very brief reference to the credibility of the witness J. A. Magoon in this case is perhaps not out of place as some of the findings made are based, in part at least, upon his testimony. The witness impressed us while testifying as being truthful. He was not hostile to the respondent; on the contrary he seemed somewhat reluctant to give testimony which might tend to prove the charges. His interest, so far as there was any, would seem to have been against testifying any further than was absolutely necessary. He was not cross-examined or his evidence contradicted in any material respect by the respondent.

That in cases of this nature the court should act with unusual caution both in weighing the evidence and in determining the penalty or order, is fully appreciated. See *In re A. S. Humphreys and F. E. Thompson*, ante p. 155. The law undoubtedly is that an attorney should not be suspended or disbarred unless the court is clearly satisfied of his guilt. Our findings in this case are made with that rule in mind.

Acts such as the respondent has been found guilty of, on his own admissions and otherwise, cannot be tolerated. They are inconsistent with the principles of justice and honor and

fair dealing. To impede and delay a settlement satisfactory to a client solely for the purpose of securing an extortionate fee from some one, to abuse the process of the courts in order to compel a weak-minded and easily influenced aged man who has a dread of litigation to purchase his peace by paying a large sum of money even though it be for the benefit of a client, and to compel such aged man, by means of threats and intimidation to pay a fee substantially larger than he was willing to pay, constitutes misconduct so gross as to show the attorney to be unworthy of his office and as to merit and require disbarment. We can no longer certify to the public that the respondent is worthy of confidence and patronage in the line of his profession or that he may be safely entrusted with its powers. If the fact be that the respondent regards his conduct and methods and purposes in connection with the two suits as outlined by him to be honorable and proper, then we can only say that we cannot share in or countenance such standards and that we decline to be responsible in any degree for his acts.

The order of the court is that the respondent be and he hereby is disbarred and that his name be stricken from the roll of attorneys and counselors of the courts of this Territory.

Attorney General Andrews and W. S. Fleming in support of the information.

Respondent in person.

DISSENTING OPINION OF GALBRAITH, J.

I am inclined to concur in one finding made by the court, namely, that the respondent, under his own evidence, is guilty of a misuse of the process of the court in bringing the injunction and guardianship proceedings. Still it is apparent that the wrong done thereby is more theoretical than real; that Sumner was annoyed and worried by the suits is clear, but as a result of the suits he made a generous allowance to his aged and helpless sister. This ought to count for something.

It should be remembered in behalf of the respondent that suits to put John K. Sumner under guardianship have been brought so often in the courts of this country that the respondent may have honestly believed that it was legitimate and proper to commence the suits although they were not pressed to a logical conclusion.

I do not think that the evidence justifies the court in differentiating between the motive of the respondent and his client in the commencement of the proceedings, since every step taken therein seems to have been consented to and approved by the client. Nor does the testimony support the finding that the respondent was guilty of blackmailing the railroad company by compelling it to pay his fee, although that fee was excessive. The additional \$5,000 was paid by the company voluntarily and was added to and recited in the deed as a part of the consideration for the land. There is much to support the conviction that with this fee added to the agreed consideration the company did not pay the actual value of the land conveyed. The respondent was regularly employed in those cases and was entitled to pay for his services. It seems that his client was not willing to pay his fee from the sum obtained for her but was willing that the railroad company should pay the amount asked as a fee and that the company voluntarily paid it. These facts fall short of establishing a case of blackmail.

Again the evidence to my mind does not sustain the finding that the respondent "by means of threats and intimidations and taking advantage of the mental infirmities of Sumner, caused the latter to pay him an excessive fee." The fee of \$2,000 paid the respondent was possibly excessive but it is not probable that Sumner was intimidated by threats to pay it. The respondent did not take Sumner alone into the privacy of his back office to talk to him about the fee. All of the conversations with Sumner about the fee were in the presence of Sumner's "leading counsel" and his friend, R. W. Davis, and when the amount was agreed on the respondent insisted that it be paid in the presence of the Circuit Judge. This latter fact alone demon-

strates the honesty of his intention. This charge should fall by reason of its sheer improbability and for want of support by credible testimony.

I can overlook some irregularities in the respondent on account of his well known idiosyncrasies and his frank and open method of doing business. I fear that the court has not made due allowance for these in its opinion. The respondent does battle in the open and not from ambush. This is something in his favor.

The reputation of the respondent for honesty and integrity in the community was testified to by some of the leading members of the bar, one of whom (Hon. F. M. Hatch) was and is the senior counsel of the Oahu Railway and Land Company, the corporation that the respondent is found guilty of blackmailing.

Hon. E. P. Dole, former Attorney General of the Territory, testified in part as follows:

“Do you know—have you had frequent occasion to be brought into contact with me in business, professionally and socially? A. I have a great deal. Q. What is my reputation in this community as to fair dealing and honesty, and my professional standing? A. I think it is very good. * * * Q. And that is your conclusion; what is it based on, Mr. Dole? A. Well I have known Mr. Davis well for over eight years. I have come in contact with him in one way and another a great deal. His peculiarities have caused him to be widely and generally discussed among the bar and among the laity, which discussions I have heard a great deal, and while his peculiarities have been censured in these discussions, his erratic traits, and he has been accused of doing many things which a man of different temperament would not do, in all I have heard said about him I have never heard an opinion expressed that in his professional course that he was not an honest and upright lawyer. His traits are such that he attracts the attention of the whole community and a great deal of discussion concerning him has been had, and if he had a reputation for being a dishonest lawyer, I certainly would know it.”

S. M. Ballou, Esq., and Hon. W. L. Stanley testified to the peculiarities of the respondent, also to his good standing in the community.

The respondent is deserving of some reproof and punishment from the court for the abuse of legal process but the judgment announced goes far beyond the demands of justice and is unreasonable and excessive.

IN THE MATTER OF J. A. MAGOON, an Attorney at Law.

ORIGINAL.

SUBMITTED JULY 28, 1903.

DECIDED AUGUST 10, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An attorney should not be punished quasi-criminally in a proceeding for disbarment or suspension instituted by the Attorney General for charging his client a fee which the court deems excessive, even though the client is an aged man of weak mind and easily influenced, when it appears that the client is satisfied, that the attorney acted honestly and in good faith, and that he did not use threats or other improper methods to induce the payment of the fee, and that there is fair ground for a difference of opinion as to the reasonableness of the fee.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

The introductory facts and circumstances of this case are set forth so fully in Mr. Justice Galbraith's opinion in this case and in the opinion in *Kellett v. Sumner*, known as the *Ropert* case, *ante* 76, and *In re Humphreys*, *ante* 155, and *In re Davis*, filed this day, that little need be added here.

Two charges are made against the respondent in this disbarment proceeding. It is conceded that one is not sustained and no further notice will be taken of that. The other is in substance that the respondent was guilty of gross professional impropriety and misconduct in inducing Sumner to pay at the conclusion of the Ropert case a fee that was grossly excessive under the circumstances, namely, a fee of \$4,000. The allegations as to the fee of \$2,500 in the guardianship and injunction cases is made not as a separate charge but merely as introductory to or as having some bearing upon the charge as to the \$4,000 fee.

The theory of this case is that the respondent has been guilty of such professional misconduct as to warrant dealing with him quasi-criminally. This is not an action by the attorney for his fees, in which he could recover only what his services were reasonably worth—in the opinion of the court or jury upon the evidence, nor is it a proceeding by the client to set aside the transaction or to recover the excess paid, because of fraud or undue influence, actual or presumed, nor is it a proceeding in which the court is asked to determine what may properly be paid as a reasonable fee by a guardian, administrator or trustee, nor is it even a summary proceeding brought by a client asking the court to exercise its summary jurisdiction over attorneys to compel his attorney to pay to him moneys unjustly withheld. It comes nearest to this last mentioned proceeding—in which the court may act upon the basis of the conduct of the attorney as distinguished from the reasonableness of his claims, and yet it is not such a proceeding. It is not brought by or at the instance of the client nor is there any prayer for such relief nor was any evidence introduced on that theory to show how much of the fee was excessive or how much should be returned to the client. And if such a summary proceeding for the enforcement of the client's alleged rights would be proper in a case of this kind, that is, to compel the return of the excess in the amount of a fee (in this instance,

not a fee retained by the attorney out of the proceeds collected but a fee paid voluntarily by the client after payment to him of such proceeds), would not the complaint have to be dismissed and the client left to his action if it appeared that the attorney acted in good faith and not dishonestly? In *Rule on Kennedy*, 120 Pa. St. 497, 502, the court said, quoting in part from an earlier Pennsylvania case:

“ ‘If the client is dissatisfied with the sum retained, he may either bring suit against the attorney or take a rule upon him. In the latter case the court will compel immediate justice or inflict summary punishment upon the attorney, if the sum be such as to show a fraudulent intent. But if the answer to the rule convinces the court that it was held back in good faith and believed not to be more than an honest compensation, the rule will be dismissed and the client remitted to a jury trial.’ And we may add to this that a man does not lose his right to trial by jury because he is an attorney-at-law. Where an issue of fact is fairly raised between himself and his client he is as much entitled to such trial as any other citizen.”

The Supreme Court of the United States said, per Mr. Justice Bradley, in the case of *In re Paschal*, 10 Wall. 483, 491:

“If an attorney have collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to compel him to pay the money, in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or assumpsit but is a quasi criminal proceeding, in which the question is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly in not paying it over. If no dishonesty appears the party will be left to his action. The attorney may have cross demands against his client, or there may be disputes between them on the subject proper for a jury

or a court of law or equity to settle. If such appear to be the case, and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction."

It is true that attorney and client sustain a confidential relation towards each other and that in consequence when dealings between them are sought to be set aside the burden of proof is shifted to the attorney to show that the transaction is fair and reasonable, but not only is this not such a proceeding but even when such transactions are set aside on the presumption of undue influence, it is not cause for the disbarment or suspension of the attorney so long as he has acted honestly and in good faith. The transaction in such case is treated as it would be if it were between others in confidential relations, and the parties are left to their civil remedies.

The question then is whether the respondent acted in such a way as to call for punishment quasi-criminally. Is such conduct shown by what was actually done to induce the payment of the fee, and, if not, was the fee itself so grossly excessive as to show such conduct irrespective of what was done by the respondent to induce its payment? It would seem that there could be but one answer to the first of these questions. The evidence (for the prosecution as well as for the respondent) shows that the respondent did not say a word to Sumner about fees until after the conclusion of the Ropert case and after the proceeds of that case were deposited to Sumner's credit in the bank; that he then said to Sumner that he thought that they ought to make some settlement as to his fee; that Sumner then asked how much he wanted, to which the respondent replied that he preferred to leave it to him (Sumner); that Sumner said he thought \$2,500; that the respondent, who was, as he says, surprised and had in mind \$5,000 as a proper fee, called his (Sumner's) attention to the amount of work that he had done and particularly to a number of other suits and matters besides the Ropert suit in which he had acted for Sumner and said that he thought that \$4,000 would be a very fair and

reasonable fee, to which Sumner replied that it was all right and that he was perfectly satisfied; and that the respondent then said that if he (Sumner) were not satisfied, he, the respondent, wished him to say so and be frank with him, but that Sumner said, no, he was perfectly satisfied, it was all right. All of this took only a few minutes. Sumner soon afterwards told his nephew, R. W. Davis, with whom he was living and with whom he talked over everything at that time and in whom he seemed to have complete confidence, that he was satisfied. He likewise told the Attorney General the same thing when the latter made inquiry of him preparatory to bringing this proceeding. He reiterated it several times on the witness stand in this proceeding,—that he was satisfied when he paid the fee and was still satisfied, though he also said (but just after he had been asked why he had paid the respondent \$4,000 and his associate counsel \$2,000, the latter of whom had threatened to suit him) that he was afraid that if he refused they might bring a suit against him and that he felt within him that the sum of four thousand dollars was too large but that he did not say so. It looks much as if this last idea were an after-thought, but suppose it were not, there was nothing at the time to indicate to the respondent that Sumner had any such thought "within him." What should the respondent have done? Who should name, or at least suggest, the amount of an attorney's fee if not the attorney himself? Where should he do so if not in his office? When should he do it, if not when the litigation is terminated (or before), even if his client is then in a happy frame of mind over his victory? Sumner seems still to be in that frame. How long should the attorney wait, especially when his client, as in this case, was about to leave the Territory for an indefinite period to return to his home in Tahiti? Sumner evidently looked upon the respondent as the one who had brought that suit to a successful termination, and was much pleased with his work in that and other matters and apparently is still pleased. He looked upon the respondent

in a very different light from that in which he looked upon the respondent's associate counsel. He himself proposed to pay the respondent \$2,500 but held out long and strenuously against paying the associate more than \$1,500 and readily acquiesced in paying the respondent \$4,000 when the latter called his attention to all the services that that fee was to cover.

Now as to the amount of the fee. It was for the services of the respondent as leading counsel in the Ropert case—a case involving \$48,025 and some real property, valued at from ten to twenty thousand dollars, all of which was secured to Mr. Sumner. It was a most hotly contested case, involving difficult questions of law and fact, and one in which the respondent was subjected to much personal abuse by opposing counsel. The fee was also for services in defending an action of assumpsit for about \$2,700 and \$700 interest, which required several days of trial before the jury, resulting in a verdict against Sumner for about \$1,500. It covers services to be rendered on the appeal in that case in the Supreme Court, and, on a new trial, if one is ordered, and on a second appeal, if one is taken, and so on to the termination of the case. It covers services in successfully defending Sumner in a proceeding to have him placed under guardianship, as an insane person, and all services to be rendered on appeal and further trials or hearings, if any, thereafter. It covers services rendered in procuring for Sumner the \$48,025 from Sumner's trustee, the settlement of the account with the trustee, the cancellation of a will, the drafting of a conveyance from the trustee to Sumner (all this before the Ropert suit was begun), the subsequent drafting of a power of attorney from Sumner to the respondent, the drafting of a trust deed from Sumner to R. W. Davis covering thirty or forty thousand dollars worth of property, the adjustment of a number of claims against Sumner without suit, &c., &c. It is true Mr. G. A. Davis, respondent's associate, had already received \$2,000 as his fee, but that apparently was excessive for his services in the Ropert case alone,

and in so far as it was excessive and obtained by undue influence it need not be considered in connection with the respondent's fee. Mr. Davis also did not come into the case at the start. The respondent was leading counsel, and, besides himself, two other attorneys in his office devoted much time to the case. The matters outside of the Ropert case which the respondent's fee also covered were not covered by Mr. Davis' fee. While the fee paid to the associate counsel should be taken into consideration the fee for both leading and associate counsel together should be greater than the fee for one alone should be if there were no associate. Now, in our opinion the respondent's fee was excessive even for all the services rendered and to be rendered. But is that material in this case? If every attorney is to be liable to disbarment or suspension whenever he charges a fee that is excessive in the opinion of the court or otherwise acts on a view in which the court differs from him in opinion, the profession will be a pretty dangerous one to follow. An attorney should be allowed considerable scope for the exercise of judgment. Much leeway should be allowed for honest difference of opinion—especially in proceedings of a quasi criminal nature. If we may judge from the present run of fees among the members of the bar, which apparently are somewhat higher now than they were ten or even five years ago, and often, in our opinion, altogether too high; if we may judge from the testimony given by leading members of the bar as to proper fees in cases involving that question in the courts from time to time, we may safely affirm that a considerable portion of the bar, including some of those of highest standing in point of both ability and character, would, if called upon, testify that the fee in question was not unreasonable, considering the various suits and other matters covered by it, the services yet to be rendered and uncertain in extent as well as those already rendered, the amount and difficulty and responsible nature of the work, the large amounts involved and the success attained, not to mention the absence of a re-

tainer in the first instance and the doubt as to what compensation would be obtained in view of Sumner's lack of funds outside of those involved in the suit. The respondent even advanced money for Sumner's support during the litigation. If we consider awards of fees made by Circuit Judges on various occasions (in our opinion clearly excessive) we should have to say that the fee in question is very moderate by comparison. Even if we compare the fees allowed by this court in some cases, and we do not mean to imply that they were not too large in any instances, it may be a question whether it is excessive, at least to any greater extent. No doubt the last few years have furnished instances of excessive fees sufficiently to amount almost to a scandal in the eyes of a large portion of the community and of the bar itself, and the Sumner litigation is not the least notorious in this respect. But that is no reason why the respondent should be punished quasi-criminally upon an occasion when, as seems to be the case here, the fee was asked in good faith and is such that there might be a fair difference of opinion as to its reasonableness? There is no doubt that the fee in question covered all the matters referred to. Sumner as well as the respondent says that that was the agreement at the time, and the receipt which was given afterwards, but before this proceeding was thought of, specifically so states. The receipt was not given at the time either because it was thought unnecessary or because the respondent had to hurry into court. When it was given, which was in July, about a week or so before this proceeding was begun, it was dated July 26 by mistake for June 26, the day on which the fee was paid.

Of course if Mr. Sumner were a man of ordinary strength of mind, it would be preposterous to hold that the respondent should be punished for charging a fee of this amount under the circumstances. The only serious difficulty in the case would seem to arise from the fact that he is an aged man of weak mind and easily influenced. There is no doubt of this—as shown by his inability again and again to escape imposition in

the management of his property—although two Circuit Judges have recently held that he was sane, and a large number of the leading physicians, lawyers and business men of this city have certified to his sanity. The respondent contends that Mr. Sumner, while appearing in an unfavorable light, indeed, at his worst, on the witness stand, seems as rational as others in private conversation, and that, while credulous and easily misled by flattering promises, he is strong minded in the sense that he knows what he wants or does not want and that when he makes up his mind as to that, nothing can move him. There seems to be much truth in this contention,—to judge from the evidence in the various Sumner cases that have come before us. But it is unnecessary to attempt a psychological analysis of Mr. Sumner—a problem which has puzzled many and led to diverse opinions. It no doubt makes a great difference how Mr. Sumner is handled. He must be dealt with, if successfully, in peculiar ways, but that does not show that he is not weak minded and easily influenced. It merely shows that his weak points must be discovered and appropriately played upon. That he cannot endure prolonged mental strain is evident. But how does all this affect the question now before us? If the respondent could have asked a fee of like amount for like services of one in normal mental condition without being subject to quasi-criminal proceedings, could he not of Mr. Sumner? In the one case there might perhaps be a recovery of part in an appropriate proceeding if it should be decided that the fee was excessive, and in the other, not. But can it make any difference in a proceeding of this kind so long as the charge was made honestly and in good faith. Mr. Sumner was not under guardianship. Could not the respondent properly charge the client who employed him what he thought was a reasonable fee? And it seems clear that the respondent thought this a reasonable fee. Must he first have seen that Sumner had legal advice as to the amount of the fee? There is no rule of law requiring that, and should the attorney, if any, called upon to advise him as to

that fee likewise see that Sumner had further legal advice as to his, the second attorney's, fee and so an *ad infinitum*? No doubt it would have been appropriate, if nothing more, for the respondent himself to have sought advice in a friendly way of brother attorneys or perhaps even of a judge as to what would be a reasonable fee under the circumstances, but there was no obligation on him to do so. That is not infrequently done even in respect of fees charged men of unquestioned mental soundness. Even such men often pay without objection what they consider excessive fees because the attorneys charge them. In the present case Mr. Sumner both at the time and afterwards, when there was no reason whatever for saying so if he did not feel so, said that he was perfectly satisfied. The respondent could not have made it easier for him to object if he had cared to. There was room for an honest difference of opinion as to the reasonableness of the amount. Under such circumstances, how can the court inflict a penalty in a proceeding of this kind—merely because it differs in opinion from the attorney as to the reasonableness of the charge?

The complaint is dismissed.

Attorney General L. Andrews and W. S. Fleming in support of the complaint.

Respondent in person; *J. Lightfoot* also for the respondent.

DISSENTING OPINION OF GALBRAITH, J.

This is one of the series of disbarment proceedings growing out of the recent litigation concerning the proceeds of the sale of the John K. Sumner reef property to the Oahu Railway and Land Company.

It is charged in the information filed by the Attorney General that J. Alfred Magoon, a member of the bar of this court, "has been guilty of professional improprieties, malpractice and gross misconduct," setting out specific charges. It will be necessary here to consider only the specifications that find support in the evidence.

These are as follows: 1. "That on or about the 4th day of September, 1902, one Maria S. Davis brought an action before a judge of the Circuit Court of the First Circuit, of the Territory of Hawaii, to declare her brother, John K. Sumner, *non compos mentis*, and to put him under guardianship, as an insane person; that on the trial of said action, said J. A. Magoon appeared as one of the attorneys for Maria S. Davis; that thereafter, and on or about the 13th day of October, 1902, the said action was compromised and settled by the said Maria S. Davis receiving from John K. Sumner the sum of ten thousand dollars for herself, and five thousand dollars for the payment of her attorneys. That the said J. A. Magoon, for his services in said action, received the sum of two thousand five hundred dollars."

2. "That the said John K. Sumner was a man of upwards of the age of 84 years, with little or no knowledge of business, or the value of money, and, by reason of his great age and lack of knowledge, was easily influenced and controlled, all of which facts were well known to the said J. A. Magoon."

The information after reciting that subsequent to the settlement of the guardianship suit Magoon was employed by Sumner as one of his attorneys in the Ropert-Sumner case, a suit in equity in the First Circuit Court, involving the construction of the trust deed from Sumner to the Bishop and the ownership of the \$48,025, the remainder of the proceeds of the sale of the reef property, and that on January 12, 1903, that suit was decided in favor of Sumner by the Circuit Judge and that on appeal to this court that decision was affirmed on June 25, 1903, charges further,

3. "That on or about the 26th day of June, 1903, said J. A. Magoon persuaded and induced said John K. Sumner, although well knowing his weakness and inability to understand financial matters, to pay him a fee for his services in the aforesaid case of Ropert v. Sumner the sum of four thousand dollars, he, the said J. A. Magoon, well knowing that said John K. Sumner had paid George A. Davis the sum of two thousand dollars as associate counsel with said J. A. Magoon in said case, and that he, the said J. A. Magoon, and the said George A. Davis had just prior thereto, and on or about the 13th day of October, 1902, obtained from the said Sumner the sum of five

thousand dollars for legal services in the suit of Maria S. Davis above named."

"And complainant charges that said fee was grossly excessive, in view of the services rendered, and the amount of money recovered, as well as the amount of money previously paid by said John K. Sumner to said J. A. Magoon and George A. Davis, and that said Magoon, in inducing said Sumner to pay said fee and in taking advantage of his age and infirmities as aforesaid to charge and obtain such fee, was guilty of gross professional impropriety and misconduct."

The respondent admits the allegations made in the first charge as above set out but attempts to justify his conduct on the ground that the services rendered by him in that case were reasonably worth \$2,500, and that that suit had "absolutely no connection" with the Ropert-Sumner case in which he appeared for Sumner and charged the \$4,000 fee.

The only evidence on the question of the reasonableness of the fee charged in the first suit is the testimony of the respondent that it was reasonable and the record in the case, so far as the record shows there was no intricate or difficult questions of law involved in the guardianship suit. It appears to have been a simple probate case and although the trial extended over nine or ten days I could not find as a matter of law or fact that five thousand dollars was a reasonable fee for two firms of attorneys appearing for the petitioner in that case. While the guardianship and Ropert-Sumner suits were separate and distinct actions I cannot find that they were absolutely disconnected. The attorneys' fees in each case were paid by J. K. Sumner and from the same fund, namely, the one hundred and ten thousand dollars paid for the reef property. So far as the attorneys' fees and John K. Sumner are concerned the suits were intimately connected.

As to John K. Sumner's mental and physical condition and inability to take care of his own as charged in the second allegation of the information the "respondent admits that John K. Sumner is a man of upwards of the age of eighty-four years, but denies that he has little or no knowledge of business or the

value of money; and further denies that by reason of his great age and lack of knowledge, he is easily influenced and controlled. On the other hand respondent affirms that said John K. Sumner is a man of large business experience for one in his walk of life, and with his education and opportunities. Respondent believes that J. K. Sumner has a keen appreciation of the value of a dollar, is economical and saving, but respondent further believes that said J. K. Sumner is sometimes inclined to be too credulous to those who hold out flattering offers to him. That said J. K. Sumner is a man of strong will and firm purpose, and cannot be easily influenced by threats or promises to do that which he has set himself against, or which he thinks is improper." This quotation is made from the sworn answer of the respondent. It is supported by the testimony of the respondent at the hearing and is opposed. 1. By allegations made by the respondent in certain sworn pleadings filed in the Circuit Court of the First Circuit, namely, in the bill of John K. Sumner, a *non compos mentis*, by his next friend, *Maria S. Davis, v. M. P. Crandall* filed February 18, 1895, and offered in evidence in this case, wherein it is alleged "That the mind and memory of the plaintiff have for sometime been failing and that he is now and for some months last past has been unable to understand his affairs and to intelligently transact business." This bill is signed "J. Alfred Magoon, Solicitor for the plaintiff." Further support is found in the allegation in the petition in the guardianship case filed September 4, 1902, wherein the respondent appeared for the petitioner, and received a fee of \$2,500 for so doing. "That John K. Sumner is of unsound mind and has been for several years past and has been and is unable to transact any business or in any way care for and control his property."

2. By the finding of this court in the decision rendered in the Ropert-Sumner case, the very case wherein the respondent charged the fee of \$4,000 for his services, that "Sumner was an old man, weak-minded and easily influenced." There is other evidence that supports the correctness of this finding but

the foregoing is ample to sustain the allegation of the information that Sumner was, on the 26th day of June, 1903, a very old man, "with little or no knowledge of business, or the value of money, and, by reason of his great age and lack of knowledge, was easily influenced and controlled all of which facts were well known to the said J. A. Magoon."

The respondent denies the allegations made in the third count above set out and recites in detail in his answer the services rendered, the difficulties encountered and overcome in the litigation and the great value of his services to Sumner and alleges that the \$4,000 fee was voluntarily and cheerfully paid by Sumner and that \$5,000 would have been paid if he had insisted on it and that \$4,000 for his services in the Ropert-Sumner case alone "would be a very fair and moderate fee, low fee;" that this fee was not only for his services in the Ropert-Sumner case but was in full for services rendered and to be rendered in other cases pending in court against John K. Sumner and in which the respondent was of record as counsel, namely, an assumpsit suit for \$2,700 tried in the Circuit Court and in which judgment was rendered for \$1,500, and now pending on exceptions to this court, and a suit of Willie Ellis to have a guardian appointed for Sumner and an application for an injunction in that proceeding; that on motion the injunction was denied and the petition for guardian was dismissed by the Circuit Judge and that appeals are now pending to this court, also for services rendered in conferring with certain of Sumner's creditors and for many other services that he cannot now recall.

The following receipt was given in evidence:

"July 26, 1903.

Received from J. K. Sumner Four Thousand Dollars. In full for professional services in all matters of litigation now pending in which I appear of record as counsel and all past services.

\$4000.

(Signed) J. ALFRED MAGOON."

The information against the respondent in this matter was filed and served on July 24th, 1903, two days prior to the date of this receipt. The respondent claims that the date of the receipt was an error; that he wrote "July" for "June;" that he gave no receipt on the 26th of June when the \$4,000 was paid and that about a week prior to the filing of the information Sumner and R. W. Davis called at his office and asked for a receipt and that the above receipt was then written and delivered to Sumner. In this testimony the respondent is corroborated by the evidence of R. W. Davis.

Aside from the date of this receipt there are circumstances that strongly indicate that the claim that this \$4,000 fee was for services rendered and to be rendered in other cases as well as in the Ropert-Sumner case, was an after-thought due to publicity and the threatened investigation, and to justify the inference that the respondent charged this fee for the Ropert-Sumner case alone. In the book which the respondent purchased and opened for Sumner on June 26, 1903, intended to show his disbursements of the \$48,025 are two entries, relative to this \$4,000 fee, the first is: "To cash paid J. A. Magoon %c Services 2,000." The second is: "To cash paid J. A. Magoon by cheque, 2,000." There is nothing in these entries to indicate that Sumner or the party making the entries for him understood that the \$4,000 paid the respondent on this day was in full of services rendered even. However, the question of what services this fee was to cover, being in doubt, I am inclined to the opinion that the respondent is entitled to the benefit of the doubt and am willing to allow that this fee was paid to cover services rendered in other cases as well as in the Ropert-Sumner suit. The other cases pending were the assumpsit suit of Ah In and the guardianship and the injunction proceedings. It is claimed that \$250 would be a reasonable fee in the former suit and although the respondent did not fix the amount of the fee that he believed should be allowed in the other proceedings we assume that \$250 would be ample compensation for all services rendered and to be rendered in that proceeding. That leaves

\$3,500 for the fee in the Ropert-Sumner case and the services of preparing papers and consulting with creditors of Sumner and passing their claims. Among the scale of charges the respondent gives to cover a part of the amount is \$50 or \$100 for drawing a power of attorney from Sumner to himself wherein it was provided that the respondent should be paid a commission of 5% on the gross amount of all money passing through his hands and \$500 for preparing a trust deed from Sumner to R. W. Davis.

It seems that the respondent from the time of his employment in October, 1902, until the day of payment, June 26, 1903, said nothing about a fee and he was therefore entitled to charge what his services were reasonably worth not what he thought they were worth or as much as he could induce Sumner to pay him. *Reynolds v. McMillian*, 63 Ill. 46-47; *In re Dorland*, 63 Cal. 281, 282.

After the decision of this court in the Ropert-Sumner case and the \$48,025 had been turned over to Sumner and deposited in the bank, Sumner was, as a matter of course, in a very pleasant frame of mind towards the respondent and it was then in the quiet of respondent's office that Sumner was asked about the fee. The respondent testifies that he had in mind to charge a fee of \$5,000 but he thought that possibly Sumner would give him more so he asked Sumner what he was willing to pay and Sumner replied that he thought \$2,500 about right. At this the respondent claims to have been surprised and recounted to Sumner what he had done and intended to do for him and the great value to him of respondent's services and said that he thought that \$4,000 would be a proper fee. Sumner acquiesced and paid the \$4,000.

Sumner testifies that while he thought \$2,500 was a reasonable fee he paid the \$4,000 because he thought the respondent would sue him if he refused to pay it and he did not want another law suit. The fact that Sumner after the payment expressed himself as satisfied and did not make complaint against the respondent cannot materially affect the issue in

this case between the court and one of its officers wherein the propriety of the conduct of an officer of the court is questioned.

The question is not whether or not Sumner is satisfied but whether or not respondent was guilty of gross impropriety and misconduct in accepting a fee of \$4,000 under the circumstances in this case.

The charge in the information is that this fee was grossly excessive and that the respondent in inducing Sumner to pay it took advantage of his age and infirmities and was therein guilty of professional impropriety and misconduct.

If this were a suit in equity between the client and the attorney to set aside this transaction or to recover excessive fees there can be no question as to the equitable rule that should be applied. The relation of attorney and client existed at the time of the payment of this \$4,000 fee between the respondent and John K. Sumner.

"The courts of England have uniformly watched all the dealings between attorneys or barristers and their clients with the closest scrutiny, and have established very rigorous rules concerning them. * * * * * The presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice." Pomeroy's Eq. Jur. Sec. 960.

"A solicitor *may* purchase from his client, although the bargain would be subject to the most rigid scrutiny, and the *onus* of showing its fairness lies on the former; but a gift from client to counsel is absolutely void." * * * * * "The general rule of public policy which discountenances transactions between persons who are situated in a confidential relation towards each other, applies with particular force to the case of attorneys at law who are officers of the court, and are, on that ground as well as on account of the powerful influence which they exercise over the minds of their clients, restrained from dealing

with those whose interest they have in charge." Bispham's Prin. of Eq. Sec. 256.

In discussing a written instrument executed between attorney and client the Supreme Court of New York said, "In such a case the right of action is not deemed to be established on the instrument, without clear proof, outside the paper, of its integrity and entire fairness. The legal presumption is against its validity, and the *onus* is on the agent and attorney to show that all was fair, and that the client acted freely and understandingly. So if an attorney bargain with his client, the burden is on him of establishing its perfect fairness, adequacy and equity; and if no proof be given, or if the proof be insufficient to meet this requirement, the court must hold the case as one of constructive fraud. (Story's Eq. Juris. Sec. 511.) The rule is the same as to dealings between client and attorney (*id.* 315). This is a rule of propriety and public policy. Judge Story has well said that the 'law, with a wise providence, not only watches over all transactions of parties in this predicament; but it often interposes to declare transactions void, which between other persons would be held unobjectionable;' he adds, 'it does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties.' It was decided in *Evans v. Ellis*, by the Court of Errors, (5 Denio, 640) that where the relation of solicitor and client exists, and a security is taken by the solicitor from his client, the presumption is that the transaction is unfair, and the *onus* of proving its fairness is on the solicitor. In this case Senator Spencer says, in substance, that transactions between solicitor and client are to be looked on with no favor, and should be scrutinized with the utmost rigor; and Beardsley, J. says that no security given by a client to his solicitor should be allowed to stand in any case, unless its fairness in every respect is shown by the solicitor. The presumption in such cases is against the fairness of the transaction, and the burden of proof to repel the presumption is on the solicitor. He must show he gave value for it." *Brock v. Barnes*, 40 Barb. 521, 527, 528.

In *Tyrrell v. Bank of London*, 10 H. L. Cas. 26, 43, the Chancellor said, "My Lords, there is no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honorable observance, than the relation between solicitor and client; and I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect of the subject of any transaction in the relation, between him and his client, make gain to himself at the expense of his client, beyond professional remuneration to which he is entitled."

I know of no reason why this equitable principle that looks upon the transactions between attorney and client with suspicion and that casts the burden on the attorney of showing the same to be just and fair and that he rendered full remuneration for the fee received should not be applied in this case.

The respondent has particular reasons for familiarity with this principle since this court not long since applied it in setting aside and annulling a transaction with another one of his clients, also an aged man, whose "mind works slowly," and who "was somewhat dull and simple," wherein the court found that "Mr. Magoon was acting for both parties." (*Christley v. Magoon*, 13 Haw. 402, 405, 409.)

Has the respondent sustained the *onus* cast on him by this principle and shown that the transaction was just and fair and that the services rendered and to be rendered John K. Sumner were reasonably worth the sum of \$4,000? I think that he has failed to do this.

I cannot escape the conclusion that, on the 26th day of June, 1903, the respondent knew that he was dealing with his client, "an old man, weak-minded and easily influenced" by a person in whom the client had confidence and that the respondent then knew that he possessed the full confidence of John K. Sumner and that he was in a position where he could exercise great influence with and over John K. Sumner.

The respondent selected a most opportune time to make a satisfactory arrangement (to himself) for his fee, at the successful termination of a rather protracted suit and immediately after the fruits of the victory had been deposited in the bank subject to the client's order, and the place was also favorable for the exercise of undue influence of the attorney over his client, alone in the privacy of respondent's office, no witness being present, (except possibly one of respondent's partners), even Sumner's recent close friend and partaker of his bounty, R. W. Davis, was not there. At such a time and place the respondent induced his client John K. Sumner, to pay him a fee of \$4,000. The respondent did not suggest to John K. Sumner that he take time to think about the reasonableness of the charge or consult with his friends or some disinterested person who was acquainted with the usual and customary charges for legal services in the community but seems to have hastened the consummation of the transaction. The respondent says in his evidence "I had to go away so soon, rush up to the court from my office. I partly ran, I think to get here just at ten o'clock when court opened." The money was deposited in the bank between 9:30 and 10 o'clock. The respondent after the money was deposited, went with Sumner to his office, arranged for and collected his fee of \$4,000 and was at the court by ten o'clock. This did not leave much time for deliberation. The respondent, possibly thought,

"If it were done, when 'tis done, then 'twere well,
It were done quickly."

To establish the fairness and reasonableness of his fee the respondent gives his own testimony that it was so. He does not offer the evidence of any other member of the bar to prove that fact or to show the usual and customary charges for legal services in this community. He does refer to some particular fees allowed by the courts in certain cases but none of these are a vindication of the transaction in question. We had the record in the Ropert-Sumner case before us for some time and are rather familiar with it and from the record we can form some

reasonable idea of the value of the services rendered by the respondent in that case. It is possible that my standard of fees for legal services is not as high as that of some members of the bar. At any rate I do not place the same value on respondent's services in this case that he does. I am inclined to the opinion that it is not improbable that much of the acrimony and bitterness and many unpleasant features of the Ropert-Sumner suit and its unfortunate connections might have been avoided if the respondent had been less reckless and more cautious in his method of obtaining the money from the Bishop and in the destruction of the Will and attempted cancellation of the trust deed.

• In view of the fact that the respondent and another attorney were paid a \$5,000 fee by John K. Sumner in a probate case for a few days work in October, 1902, and his associate counsel in this case was paid a fee of \$2,000, this \$4,000 fee does seem exorbitant and excessive. It at least calls for more convincing evidence than that offered by the respondent to prove that he acted "honestly and in good faith" and that this last fee was fair and reasonable and that he "gave value for it."

What punishment should be administered to the respondent for this gross "misconduct and professional impropriety" is a difficult question. To strike the name of an attorney from the rolls and debar him from following an honored profession is a very serious matter—one that gives the court no little difficulty to determine. There is scarcely a more unpleasant duty that can come before a judicial tribunal than passing on charges of misconduct against an attorney. In such a proceeding the court owes a duty to the community no less than that to the bar; to the former protection against those who violate the obligation of the profession and misuse the office of an attorney and counsellor at law and to the latter that its fair name is not brought in to reproach by the conduct of unworthy members. The community, however, does not need protection so much against the attorney who fights in the open, even if he does happen, some time, to get on both sides of the same litigation, as against

the attorney who, when proceedings for disbarment are brought against him, expresses gratitude to the Attorney General for bringing them and casts flowers at the court which sits in judgment upon him. The attorney with "the candied tongue" is the real menace to the community and a reproach to the profession. Such an attorney is liable to deceive the credulous and to prey upon the weak and helpless.

I do not believe that the respondent, in collecting the \$4,000 fee from John K. Sumner, under the circumstances above set forth, acted "honestly and in good faith." His desire was to get all he could out of Sumner without offending him, without regard to the value of the services rendered. Taking advantage of an old man in the condition of John K. Sumner, is a serious offense and certainly deserves reproof and punishment at the hands of the court. The judgment of the court sends the respondent forth "unwhipp'd of justice."

IN THE MATTER OF THE APPLICATION OF
GEORGE H. FAIRCHILD FOR A WRIT OF MAN-
DAMUS AGAINST W. G. SMITH, CHARLES A.
RICE AND W. G. SHELDON, COMPOSING THE
BOARD OF REGISTRATION FOR THE ISLANDS
OF KAUAI AND NIIHAU.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

SUBMITTED OCTOBER 5, 1903.

DECIDED OCTOBER 7, 1903.

FREAR, C.J., GALBRAITH, J., AND DEBOLT, FIRST JUDGE, CIR-
CUIT COURT, FIRST CIRCUIT, IN PLACE OF PERRY, J., AB-
SENT.

Under the provisions of the Organic Act and the County Act, there can be no new registration of voters for the first county election, in 1903. The registration list of voters for 1902 alone can be used.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from a peremptory writ of mandamus issued by the Circuit Judge of the Fifth Circuit ordering the respondents, as the Board of Registration for the islands of Kauai and Niihau, which constitute the Sixth Representative District and are about to become the County of Kauai, to convene before October 10, 1903, and permit the petitioner to submit to them the proofs of his right to be registered as a qualified elector in said District. The question is, whether, for the election of county officers on November 3, 1903, that is, at the first election under Act 31 of the Laws of 1903, which provides for the organization of county governments in this Territory, the registration list prepared immediately prior to the general election of 1902 for Delegate, Senators and Representatives should alone constitute the list for the county election in question, or whether a complete new, or at least a supplementary list, should now be prepared so as to let in persons otherwise qualified at the present time but who were not registered in 1902 because of illness or absence or because they were not then otherwise qualified or because of other reasons. It would no doubt, as contended, be a hardship for one who could not have registered last year to be prevented from voting this year, if otherwise qualified, and, in case of doubt, the court naturally would lean to that construction which would permit him to register and vote, but the provisions of both the Organic Act and the County Act which bear upon this question are so plainly against the petitioner's contention as to preclude the relief sought.

The Organic Act provides (Sec. 14) for general elections of Senators and Representatives in November, 1900, and every second year thereafter, and (Sec. 60) "That in order to be qualified to vote for representatives a person shall— * * * Fourth. Prior to each regular election, during the time prescribed by law for registration, have caused his name to be entered on the register of voters for representatives for his district. * * *," and (Sec. 62) "That in order to be qualified to vote for Senators and for voting in all other elections in the

Territory of Hawaii a person must possess all the qualifications and be subject to all the conditions required by this Act of voters for representatives." Thus it appears that in order to vote at the coming county election, which is included among "all other elections" in Section 62, a person must under that section possess all the qualifications and be subject to all the conditions required of voters for representatives, and that one of those qualifications or conditions (it is immaterial whether it be considered one or the other, although both Sections 60 and 62 expressly call it a qualification) is that the person not only shall have registered but shall have registered prior to the regular election for representatives, that is, in the present case, in 1902. In harmony with and emphasizing this are the Rules and Regulations for Holding Elections (Civil Laws, Appendix) which were amended and continued in force by Section 64 of the Organic Act. Section 31 of these rules (Civ. Laws, p 796), as amended, provides that, "The Boards shall meet within their respective Districts at such times between the last day of August and the tenth day of October in the year nineteen hundred, and between such days in each second year thereafter, as many times as may be necessary to enable them to register all persons entitled to register," and Section 32 provides that, "At any intermediate special election the register of voters used at the last preceding general election shall be used without change." It is thus clear that the register used at the last preceding regular or general election for representatives is the one to be used not only at intermediate elections of representatives, but also at all other elections in the Territory, including county elections. If the County Act contained provisions inconsistent with these provisions of the Organic Act, it would, of course, be invalid and inoperative to that extent.

But the County Act itself would seem to call for the same conclusion. The portion of that Act that provides for the first county election is Chapter 83, which includes Sections 456-470. The only section that provides specifically who may vote at this election is 462, which reads: "All persons shown by the records to have been qualified voters at the general election in the

year 1902, shall be qualified to vote at such election. The lists forwarded by the Inspectors of Election to the Secretary of the Territory; after the election, shall be forwarded by the Secretary at some time prior to the election, in order that the Inspectors may be provided with lists of all persons qualified to vote." This shows as clearly as can be shown by implication that only those may vote at this election whose names are on the lists prepared for the general election of 1902. The first sentence of this section expressly prescribes who shall be qualified to vote, namely, those on those lists, and the second sentence expressly provides how those who are qualified shall be ascertained by the Inspectors, namely, by the latter being furnished with such lists, and this is "in order that the Inspectors may be provided with lists of *all* persons qualified to vote." But it is contended that Sections 465 and 466 provide otherwise. These read as follows: "Section 465. All of the provisions of law relating to general elections are hereby declared to be applicable to such election. Section 466. All of the provisions of law are hereby declared to be applicable to such election except that all records or information thereby required to be forwarded to any sheriff, shall instead be forwarded to the Secretary of the Territory." The contention is that "all of the provisions of law," that is, of the general election laws, that are made applicable to this election by these sections, include the provision for meetings of the Boards of Registration, set forth in Rule 31 above quoted. Now, it might, perhaps, be a sufficient answer to this to say that, if Rule 31 is taken literally, either it has already been complied with, for the Boards did sit at the times therein prescribed in 1902 and are not required to sit again under that rule until 1904, or else that the rule is inapplicable because it makes no provision for meetings in 1903. But, assuming that we could, in the absence of other objections, apply the rule as nearly as may be, that is, by changing the dates to suit the circumstances, still the contention cannot be sustained. Section 462, being particular, must control Sections 465 and 466, which are general. The two are to some extent inconsistent and would give rise to many difficulties, if an attempt should

be made to apply both. For instance, should the Boards make out entirely new lists under Sections 465 and 466 and Rule 31, irrespective of whether applicants were on the lists of 1902 referred to in 462? If so, they would be obliged to omit (contrary to the provisions of that section) some names appearing on those lists because some of those who were qualified when those lists were prepared are no longer qualified, and others on those lists could not, owing to illness or absence, personally apply for registration, as required by law, prior to October 10, but might be able to attend at the polls on November 3. Or, should the Boards make only supplementary lists of those who are now otherwise qualified but who are not on the lists of 1902? If so, assuming that the Boards could ascertain who were on the former lists so as to enable them to prepare supplementary lists, they would have two lists, for which there is no authority whatever under either the election or the county law, and not only would there be two lists, but the two would be made up on different bases,—one on the basis of conditions in 1902, the other on that of conditions in 1903. Or, should the Boards make new lists of all, but first place upon it all the names registered in 1902? If so, the lists would similarly be made up in part on one basis and in part on another and those on the old lists would be registered without personal application, contrary to law, &c., &c. Or, if a new list should be made, then (considering merely the question of the construction and not of the validity of these provisions of the County Act) since Section 462 prescribes who may vote at this election, the Boards could register only those therein described, namely, those on the lists of 1902, which would bring us back to where we started. But not to proceed further along this line, we may conclude by saying that if any new names could be registered under the general Sections 465 and 466, then the particular provision of Section 462 by which “*all* persons qualified to vote” at this election are to be ascertained by reference to the lists of 1902 would be nullified.

It is contended further that if the County Act does not permit persons to vote who are qualified except in the matter of registration, the law is invalid in that respect. It is true that some

courts have held that where the constitution prescribes the qualifications of voters and does not include registration among them, the legislature cannot add that, although it is said to be the better opinion that the legislature may, as a matter of regulation, require registration in such cases and even prevent persons from voting who become otherwise qualified after the last session of the board of registration and before election day, provided that interval is not unreasonably long. See 10 Am. & Eng. Enc. of L., 2nd Ed., 581; *State v. Butts*, 31 Kans. 537; 2 Pac. 618; *Weil v. Calhoun*, 25 Fed. 865; *People v. Hoffman*, 116 Ill. 587. If the provision of Section 462 of the County Act were contrary to the provisions of the Organic Act in this respect, the question might arise whether the result would not be that there could be no election rather than that the Boards could register others than those who are in terms permitted to vote. But in the present case all question of the validity of the law in this respect is removed by the fact that, as above shown, the Organic Act itself in effect provides that the list of 1902 shall alone be used at the election of November 3, 1903.

It is also contended that registration is only a regulation or prerequisite or condition and not a qualification. There are several passages in the Rules referred to that favor this contention, although, as pointed out above, Sections 60 and 62 of the Organic Act expressly refer to registration as a qualification. But it is immaterial which it is, for the Organic Act (Sec. 62) requires the voter at this election to "be subject to all the conditions" as well as to "possess all the qualifications" required of voters for representatives, one of which is registration in 1902, and Section 462 of the County Act makes the list of 1902 the sole test of "all persons qualified to vote" at this election.

It is suggested by counsel on both sides that the court express an opinion also upon the question, not presented in this case, but which it is intimated might be presented in another case, whether the petitioner is an "elector" of the county, within the meaning of Section 14 of the County Act, so as to be qualified for election as a member of the County Board of Supervisors, for which he has been nominated. This question not only is not

presented in this case but has not been argued. We feel that we should express no opinion upon it.

The order of the Circuit Judge appealed from is set aside and the case remanded to him for any further proceedings that may be proper consistently with this opinion.

R. W. Breckons and *M. F. Prosser* for petitioner.

Attorney-General L. Andrews and *J. D. Willard* for respondents.

ASEU BROWN v. HATTIE BANNISTER and ANDREW BANNISTER, her husband, and A. WIGGINS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 15, 1903.

DECIDED OCTOBER 30, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

There is no statute in this Territory authorizing a mortgagor or other party in interest to redeem mortgaged property after foreclosure sale.

A judgment creditor of the mortgagor has no right to redeem the mortgaged property after sale under foreclosure in the absence of a statute expressly conferring that right.

OPINION OF THE COURT BY GALBRAITH, J.

This is an appeal from the decree of a Circuit Judge of the First Circuit sustaining a demurrer and dismissing a bill to redeem property sold under mortgage foreclosure.

The plaintiff, a judgment creditor of the defendant, Andrew Bannister, filed a bill in equity to redeem certain premises that had been sold under the power of sale contained in a mortgage as provided in Chapter 115, Civil Laws.

The bill alleges that the mortgage under which the property was sold was executed by Bannister and duly recorded in the year 1898; that the plaintiff's judgment was entered against him in the year 1902; that execution was issued on the judgment and levied on the mortgaged premises in February, 1902, and that the same were advertised for sale under the execution for April 4, 1902, that the premises were sold under the mortgage on March 10, 1902, and that the defendant, Hattie Bannister, purchased the same for the sum of \$710.00; that the defendant Wiggins is a subsequent mortgagee of the premises; that on March 19, 1902, the plaintiff tendered to Hattie Bannister the amount of the purchase money and expenses and demanded a conveyance of the premises to the plaintiff and that this demand was refused. The prayer is for process and for an order compelling a conveyance of the premises to the plaintiff on the payment of the purchase price and the necessary expenses and for general relief. The ruling of the Circuit Judge on the defendants' demurrer was based on the ground that the bill failed to state a cause of action.

It may be assumed as contended that the plaintiff by the levy of the execution obtained a valid lien on Andrew Bannister's interest in the property, but this interest at that time was no more than an equity of redemption and by the sale under the power in the mortgage this interest was foreclosed, cut off and terminated. Andrew Bannister, the mortgagor, had no right to redeem the property after the sale and certainly his creditor, the plaintiff, had no greater right in it than he had. *Kramer v. Rebman*, 9 Iowa, 124; *Mutual Loan & Banking Co. v. Haas*, 27 S. E. 980; *Durden v. Whetstone*, 9 So. 176; *Mayer v. Farmer's Bank*, 44 Iowa, 216.

Whatever the plaintiff's rights may have been prior to the sale, had she availed herself of them, it is clear that after the sale she had no right to redeem the property in the absence of a statute expressly conferring that right. *Parker v. Dacres*, 130 U. S., 43. There is no statute in this Territory giving to mortgagors or other parties in interest the right to redeem property sold under foreclosure proceedings.

There is no error in the ruling of the Circuit Judge. The decree appealed from should be affirmed. It is so ordered.

Frank Andrade for plaintiff.

Smith & Lewis and *Louis J. Warren* for defendants.

T. NINOMIYA, M. OYAMA, T. YOSHIMOTO, T. KIKAWA and I. YAMADA v. A. N. KEPOIKAI, Treasurer of the Territory.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 18, 1903.

DECIDED OCTOBER 30, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The actions of *de facto* officers, as, for example, a Board of Medical Examiners, appointed by the Treasurer instead of by the Governor, cannot be questioned collaterally.

The Treasurer cannot lawfully revoke licenses of physicians and surgeons issued by him on the recommendation of the Board of Health upon the report of the Board of Medical Examiners, merely because of a defect in the mode of appointment of the latter Board. Injunction lies to prevent such revocation by the Treasurer, there being no plain, adequate and complete remedy at law. *Certiorari* has not so wide a scope under our statute as at common law.

OPINION OF THE COURT BY FREAR, C.J.

The plaintiffs, on behalf of themselves and others similarly situated, pray for an injunction to prevent the Treasurer (originally the present defendant's predecessor in office, H. E. Cooper, for whom the present defendant has been substituted) from canceling their licenses to practice medicine and surgery. They set forth detailed allegations in their bill to show that they had such licenses lawfully and that the defendant's predecessor, the original defendant, had threatened to cancel their

licenses for a particular reason, which they contend is insufficient. The Circuit Judge granted the injunction and the defendant took this appeal.

The statute relating to the practice of medicine and surgery is Act 60 of the Laws of 1896 (Penal L., Secs. 827-835). That statute provided for the issue of a license to an applicant to practice medicine and surgery by the then Minister of the Interior upon the recommendation of the Board of Health made upon the report, after examination, of a Board of Medical Examiners consisting of three licensed physicians appointed by the Minister of the Interior. The office of Minister of the Interior was abolished by the Organic Act (Sec. 8) and his powers and duties distributed, in so far as they were continued, among other officers. To the Treasurer were given, among others, the powers and duties "which relate to licenses" (Sec. 72). But to the Governor was given the power of appointment, with the advice and consent of the Senate, of various specified officers and boards "and any other boards of a public character that may be created by law" (Sec. 80). It does not seem to be disputed that under Section 72 the Treasurer is the one to issue licenses. The sole ground upon which the Treasurer relies for the cancelation of the licenses in question is that the Board of Medical Examiners upon whose report the Board of Health recommended these licenses, upon which recommendations the Treasurer issued the licenses, were appointed by the Treasurer and not by the Governor, as he claims should have been done. The statute provides for a revocation of a license for certain specified causes and upon certain prescribed procedure, but the Treasurer does not claim that he intends to act under that provision.

We will assume that the appointments of the Examiners should have been made by the Governor under Section 80 of the Organic Act. Still, they were *de facto* officers and therefore their acts, within the scope of the powers of such officers, cannot be thus collaterally attacked. *Ex parte Ward*, 173 U. S. 456; *Hind v. Wilder's Steamship Co.*, 14 Haw. 215, and cases there cited. That the Examiners were *de facto* officers there

can be no doubt. There were *de jure* offices. There was considerable color of law for the appointments by the Treasurer, in view of Section 72 of the Organic Act and of the provision of Act 60 of the Laws of 1896 itself that the appointments should be made by the Minister of the Interior notwithstanding a provision of the Constitution of 1894 similar to that above quoted from Section 80 of the Organic Act. Such officers had been previously appointed by the Minister. Those in question had been appointed by the Treasurer and had acted for nearly a year and a half, during which period at different times they had examined and reported on the petitioners respectively. No question had been raised by any one, so far as appears, as to the validity of their appointments or their acts. No others claimed to be such officers.

It is contended, secondly, on the authority of *Gaertner v. City of Fond du Lac*, 34 Wis. 497, that this is not a proper case for an injunction because there is a proper remedy at law by *certiorari*. But *certiorari* would not lie in a case like the present under our *certiorari* statute (Civ. L., Secs. 1624-1634) which greatly limits the common law scope of such writs. That case also was brought, not, like this, to prevent the revocation of the license, but to prevent interference with the business after the license had been revoked, though this may, perhaps, not be a material distinction. It seems to us that in the present case the petitioners have not a plain, adequate and complete remedy at law and the injunction was properly issued. See *Wood v. City of Brooklyn*, 14 Barb. 425; *Castle v. Kapena*, 5 Haw. 27.

The decree appealed from is affirmed and the case remanded to the Circuit Judge.

Hartwell & Bigelow for plaintiffs.

Geo. A. Davis for defendant.

IN THE MATTER OF THE APPLICATION OF F. M.
BROOKS IN BEHALF OF DOMINGOS FERREIRA
FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 20, 1903. DECIDED NOVEMBER 10, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A decision discharging a prisoner on *habeas corpus* conclusively determines that he was not liable to be held on the state of facts then existing.

A prisoner was erroneously discharged on *habeas corpus* because, although the judgment and sentence were valid and a mittimus had been issued to the High Sheriff, who was by law responsible for the safe keeping of all prisoners, the prison-keeper was not furnished with a certified copy of the judgment and sentence and no mittimus was directed to him. No appeal was taken. Subsequently a certified copy of the judgment and sentence was furnished the prison-keeper and the prisoner was rearrested. Held that, on a second application for a release on *habeas corpus*, there was no material change in the facts, the first decision was binding and it was error to remand the prisoner to custody.

OPINION OF THE COURT BY FREAR, C.J.

The petitioner, who was serving a term of imprisonment for eighteen months in Oahu Prison under a sentence of a Circuit Court, was discharged by a Circuit Judge on *habeas corpus*, apparently on the ground that the mittimus was not directed to the keeper of the prison as well as to the High Sheriff and that such keeper did not have in his possession a certified copy of the judgment and sentence or other written authority to hold the prisoner. The petitioner was rearrested and, on suing

out a second writ of *habeas corpus*, was remanded to custody on the ground that since his first discharge the High Sheriff had furnished the keeper a certified copy of the judgment and sentence. The Circuit Judge relied on the words that we italicise in the following provision of the Civil Laws:

“Section 1674. No person who has been discharged upon a writ of Habeas Corpus, shall be again imprisoned or restrained for the same cause, unless he shall be indicted therefor, or convicted thereof, or committed for want of bail, by some Court of Record, having jurisdiction of the cause, or unless after a discharge for default of proof, *or for some material default in the commitment in a criminal case*, he shall be again arrested on sufficient proof, and committed by legal process, for the same offense.”

The petitioner contends that, in view of the first decision which has not been appealed from, the doctrine of *res judicata* applies. If the “commitment” referred to in the statute means commitment after sentence as well as preliminary commitment for trial, and if the Judge was correct in his view that the prisoner could not be held unless the keeper of the prison had a certified copy of the judgment and sentence or a mittimus directed to him, it may be that the statute would apply and the second decision be correct. But, in our opinion, the first decision was not correct. While it might be better practice to leave some written authority with the prison-keeper personally, the mittimus to the High Sheriff alone was sufficient. It was in accordance with the long prevailing practice here and the High Sheriff himself was the one “responsible for the safe keeping of all prisoners.” Civ. L., Sec. 1049. It was alleged in the petition for the writ of *habeas corpus* that the petitioner was in the custody of the High Sheriff and such writs have usually been directed to him and returns by him setting forth mittimuses to him have been deemed sufficient in *habeas corpus* cases. Again, it was held in *Ex parte Oriemon*, 13 Haw. 102, that a prisoner is held not by the mittimus but by the judgment and sentence, and is not entitled to a discharge for a defect in the mittimus if the judgment and sentence are good. And in the first case before the Circuit Judge

the High Sheriff amended his return by setting forth the judgment and sentence as well as the mittimus. That such amendment could properly be made is held in *Kelley v. Thomas*, 15 Gray 192, under a statute from which ours is copied. The Circuit Judge purported to decide the first case on the authority of *Ex parte Oriemon*, *supra*, and *United States v. Harden*, 10 Fed. 802. But it is obvious that the decision in *Ex parte Oriemon* and the authorities therein cited required the contrary ruling. They show that if the prisoner is held under a valid judgment and sentence he is legally held even though the keeper of the prison does not have in his immediate possession a copy of the judgment and sentence. The case of *United States v. Harden* did not require a different ruling.

If, as we hold, the first decision discharging the petitioner was incorrect, and if, as naturally follows from that holding and the facts of this case, there was no material change in the circumstances or the authority by which the prisoner was held at the second decision, the first decision, so long as it stands, is *res judicata*, and controls under both the statute and the general law. That a discharge on *habeas corpus* is final and *res judicata*, so long as the decision is unreversed, is well settled. *United States v. Chung Shee*, 71 Fed. 277; *In re Crow*, 60 Wis. 349. It is, of course, under the law of *res judicata*, immaterial whether the first decision was right or wrong, so long as the Judge had jurisdiction; the question is whether the second imprisonment is for the same cause and on the same authority. This is but a special application of a general rule applicable to other cases as well as to *habeas corpus* cases. The binding force of a decision does not depend upon whether it is correct or not. If that were so, no one could depend upon it. It could be called in question as often as a party might wish. Mistakes will be made. But if a judge has the requisite jurisdiction, his decision is binding, subject to the usual modes of correction, in all other proceedings brought upon substantially the same state of facts, and that, too, whether all the questions involved, whether of law or fact, were presented to or passed upon by him or not. *Ex parte Jilz*, 64 Mo.

205; *State v. Schierhoff*, 103 Mo. 47 (under a provision similar to our Sec. 1674, namely R. S. of 1899, Sec. 3598). In *McConologue's* case, 107 Mass. 154, it was held that a decision discharging a prisoner on *habeas corpus* was "a conclusive determination of all questions of law and fact necessarily involved in that result" and that "the judicial discharge of a prisoner upon *habeas corpus* conclusively settles that he was not liable to be held in custody upon the then existing state of facts, "whether such facts were proved at the hearing or not. The judgment determined the status at the time and is binding in subsequent proceedings unless it appears that there has meanwhile been a material change in the facts. The Massachusetts statute is the one from which ours was copied. See also *Bradley v. Beetle*, 153 Mass. 154. *In re Reinheimer*, 97 Mich. 619, might at first glance seem to be an authority contra under a statute that contained provisions similar to those in our Sec. 1674, but not only did the court there rely on a provision that is not found in our statute, but the circumstances were different. There was a new and valid order of commitment.

If the decision of the Circuit Judge were correct in the first case, his conclusion in the second case also would be correct, because the defect supposed to exist at first was cured. There would have been a material change in the state of facts. But since, as we hold, his first decision was erroneous, in other words, since the furnishing a certified copy of the judgment and sentence to the prison-keeper made no material difference in the state of facts, the first decision was *res judicata* and the second was erroneous. As we have seen, a decision is *res judicata* as to all questions necessarily involved, whether actually raised or passed upon or not. But here, in the first case, the question of the detention under the judgment and sentence, as distinguished from the mittimus, was actually raised, and the Judge held that the prisoner was entitled to his discharge notwithstanding—merely because the prison-keeper did not personally have a copy of the judgment and sentence.

The Attorney General should have appealed from the first decision instead of relying on the statute. We regret that we are obliged to discharge the prisoner on the present state of facts because of an error on the part of the Circuit Judge at the first hearing and the failure of the Attorney General to appeal.

The decision and order appealed from remanding the prisoner to custody is reversed and the case is remitted to the Circuit Judge with directions to discharge the prisoner.

G. A. Davis and F. M. Brooks for the petitioner.

Attorney General L. Andrews contra.

TERRITORY OF HAWAII v. CHEONG KWAI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 18, 1903. DECIDED NOVEMBER 11, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An objection to the competency of a witness offered by the Territory, in a criminal prosecution, on the ground that she was the wife of defendant, being referred to the trial Judge for decision as a "question of fact" was, after hearing testimony, overruled. *Held* that, the ruling being supported by the evidence, afforded the defendant no ground of exception.

OPINION OF THE COURT BY GALBRAITH, J. .

The defendant was charged by indictment with the offense of assault with intent to murder and on a trial thereof was adjudged guilty.

The jury might have found from the evidence offered in support of the charge the following facts, namely: That for more than one year prior to the 11th day of June, 1902, the prosecuting witness, Fong Quin, had been living in a rooming house on

Vineyard Street, Honolulu, with a Chinese woman as his mistress; that this woman had formerly been supported by and had lived with the defendant; that the defendant claimed that the woman was his wife and that she denied a marriage with the defendant; that on the 11th June, 1902, Fong Quin returned to his rooms about 11 o'clock a. m. with the intention of accompanying the woman to the horse races; that when he arrived at the house the defendant was in one of the rooms with the woman but immediately walked out on hearing Fong Quin enter and in about 15 minutes the defendant came back into the room, having a revolver in his hand and without speaking a word pointed it towards Fong Quin and fired; that Fong Quin ran out of the room and house pursued by the defendant, who fired four or five times, striking Fong Quin twice, but that neither of the wounds proved fatal.

The defendant was the only witness offered in behalf of the defense and no attempt was made, other than by cross-examination of the witnesses for the prosecution, to overcome or contradict the testimony introduced in support of the charge.

During the presentation of the evidence for the Territory the Chinese woman who was in the room when the shooting commenced was offered as a witness. An objection was made to her competency on the ground that she was the wife of the defendant, and, under our statute (Sec. 1416 C. L.) an incompetent witness. By agreement of counsel the jury was sent out and the question of the competency of the witness was submitted to the Judge "as a question of fact." The exceptions relied on in this Court were taken during the trial of this question and are (1) To the ruling of the Judge finding that the woman was not the wife of the defendant and was a competent witness, (2) To the ruling admitting and rejecting certain testimony.

The rule of evidence is that there is no presumption of incompetency and that the party insisting on the disability of the witness on account of the marriage relation must prove that the relation of husband and wife exists. 3 Jones on Evidence, Sections 762, 767, 777, 791, 794.

The burden was clearly on the defendant to prove that the witness was his wife. Apparently this burden was assumed at the trial although it is denied in his brief. An attempt was made to prove a marriage at Hongkong according to Chinese custom followed by cohabitation there and in Honolulu. Evidence at length was given to show what was essential to constitute a marriage under custom in China. The Judge found that there was a failure to show a compliance with the essentials of marriage under this custom and that a marriage had not been proved and that the witness was competent.

The defendant testified to the marriage at Hongkong and another witness swore that he attended the marriage feast. The woman testified that she had never been married to the defendant and that the first time she ever saw him was the day after she arrived at Honolulu, about 12 years ago, when he was presented to her as her protector by the steward of a sailing vessel in whose care she came to the Islands; that the defendant paid this steward \$250.00 for bringing her and that she then went to live with the defendant and continued to live with him for five years thereafter and as long as he would support her; that when the defendant refused her support she took up with another Chinaman and lived with him for a year and until he returned to China when she became intimate with a Chinese actor and after he deserted her she was taken up by Fong Quin and had lived with him for more than a year prior to the shooting.

The evidence sustains the finding of the trial judge that there was a failure of proof of a marriage between the woman and the defendant according to Chinese custom. "Whether a witness is qualified to be sworn as such is always a question for the Court." Thompson on Trials, Sec. 323. Greenleaf on Evidence, Sec. 49 (8le, 16th Ed.). This exception is not well taken.

The evidence would not warrant a finding that there was a common law marriage between the parties or support a presumption of marriage from cohabitation and general reputation recognized by some of the reported cases. The witness under

the evidence in the record was entirely too promiscuous in cohabiting for this presumption to avail the defendant.

It seems to have been assumed by both sides and the court below that the witness would have been incompetent under Section 1416, C. L., if she were the wife of the defendant. As it is not necessary to a disposition of the exception we refrain from expressing an opinion on the correctness of this assumption.

It does not appear that the defendant was prejudiced by the other rulings of the trial judge excepted to at the hearing of this question, for instance, the defendant was asked on cross-examination if he knew anything "about a custom in China by which a man gives to another man money and receives in return a woman." This question was objected to as "immaterial." The objection being overruled the witness answered. "I don't know any such custom." The evidence given by the expert produced by the defendant showed that according to Chinese custom a "go-between" was usually employed to find out the age of the girl and to arrange the details of the marriage, one of which was the transfer of a sum of money from the prospective bridegroom to the parents of the bride elect. It is said that the money was to be used in the purchase of a pig and "wine and cake" for the marriage feast, an essential element of every marriage according to Chinese custom.

The court seems to have given the defendant rather wide latitude in his attempt to prove the Chinese custom of marriage and his compliance therewith. We are convinced that the witness was competent and that there was no error in receiving her testimony.

The exceptions are overruled.

Kinney & McClanahan for the prosecution.

Frank Andrade for the defendant.

SOPHIA H. KAHALEAAHU v. MANUEL S. PEREIRA
and S. KOBAYASHI.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JUNE 17, 1903.

DECIDED NOVEMBER 12, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A suit for dower may be barred by the general statute of limitations applicable to actions for the recovery of land, but the statute does not necessarily begin to run from the death of the husband, as, for instance, when, as in this case, the widow is by the statute permitted to occupy with the heir, without assignment of dower, until the latter objects, and the land remained vacant, and the heir and the widow lived together on adjoining land, and the heir or her grantee did not claim adversely until nine years after the husband's death.

Damages for the detention of dower are allowed under the circumstances only from the date of demand.

OPINION OF THE COURT BY FREAR, C.J.

This is a suit in equity for assignment of dower and for damages for detention of dower. The plaintiff's husband died intestate seized of the land in question June 29, 1871, leaving a minor daughter as his only heir and the plaintiff as dowress. The land, which is situated on Liliha Street, Honolulu, was then vacant and remained so until the daughter, having come of age, conveyed it to one Naukana, October 7, 1880. During that period, the widow and daughter lived together on other land adjoining the land in question. Naukana leased the land, March 20, 1882, to one Wong Quing for ten years at \$65 a year and on April 23, 1883, conveyed it to the defendant Pereira,

who, sometime after the expiration of the lease, filled in the land, which was low and wet, and on May 1, 1899, leased it for fifteen years at \$300 a year to the defendant Kobayashi, who erected a hospital upon it. The Circuit Judge held that the plaintiff was entitled to dower and, finding that dower in the land could not be set apart without injury to the owner, ordered it to be paid in money amounting to \$511.76, being the present worth, at the legal rate of interest, of one-third the income for the widow's expectancy of life, and allowed further the sum of \$827.79 damages, being one-third the rents, and interest thereon, received under the two leases up to the time of the interlocutory decree. The defendant Pereira appealed.

The first question is whether the plaintiff is now entitled to dower at all. No question is raised as to the amount at which her dower interest, if any, was valued. It is contended that her right of action accrued on the death of her husband, in 1871, and that therefore she is barred by the statute of limitations, the period prescribed by which for real actions was twenty years at the time this suit was begun, in September, 1899. There is much difference of opinion elsewhere as to whether general statutes of limitations are applicable to actions for dower (See 10 Am. & Eng. Enc. of Law, 2nd Ed., 205; 19 *Id.* 180) and we have no special statute on the subject; but in our opinion the better rule is that the general statute does apply, and it was so stated in *Makauhana v. Pua*, 6 Haw. 651. But does it run from the time the right to dower accrued, in this case June 29, 1871, when the husband died, or from the time an adverse claim is set up against it, in this case April 23, 1883, when the daughter conveyed? If the latter date, the twenty years had not elapsed when this suit was begun. There is no evidence that the daughter claimed adversely to the widow before that date. The land in question was vacant and they both lived together on adjoining land. There is upon this question also—as to when the statute begins to run—some difference of opinion elsewhere. In South Carolina it seems to be held that it “does not begin to run until there is a possession in some one adverse to the claimant of dower.” 10 Am. & Eng. Enc. of Law, 2nd Ed., 206.

In many states the question depends largely on the special wording of the statutes. In *Makauhana v. Pua, supra*, it was held that ouster must be shown when the widow continued to live on the land after the death of her husband, and that in that case the statute did not begin to run until six years after such death, as no ouster was shown before that. The statute permits the widow, "when entitled to dower in land of which her husband died seized," "to continue to occupy the same with the children or other heirs of the deceased, or to receive one-third of the rents, issues and profits thereof, so long as the heirs do not object, without having her dower assigned." C. L., Sec. 1912. It is clear that the statute of limitations would not begin to run against her as long as she continued to occupy the premises or received one-third of the rents, issues and profits without objection, under this section, for she would then be under no obligation to sue for dower in order to protect her rights, although she could do so at any time during such period. Whether, before the enactment of this section (C. L., Sec. 1912), the heir could be considered as having possession in law even if he did not have it in fact, and that the widow had no right of possession at all until after assignment, so as to set the statute running against her immediately upon the death of her husband, we need not say. The view seems to have been entertained that before the enactment of this section the heir and widow were not tenants in common and that adverse possession might be shown without actual ouster or its equivalent, but that since then they should be regarded as tenants in common and that there must be an ouster in order to start the statute. *Paulo v. Malo*, 4 Haw. 536; *Iuha v. Holt*, 5 Haw. 182; *Makauhana v. Pua, supra*; *Jones v. Pooloa*, 11 Haw. 755. It seems to us that when, as in this case, the widow had a right under the statute to occupy the land with the heir or to receive her third of the rents, issues and profits, until objection should be made by the heir, and when the land remained entirely unoccupied, and both heir and widow lived together on adjoining land in a friendly way, the widow would be under no obligation to call for an assignment of dower and

the statute would not begin to run until one of them began to claim adversely to the other. There was no occasion before that for the widow to assert her rights.

It is urged, however, that equity is not bound by the statute of limitations and may deny relief on the ground of laches, even when the statute has not run. It is true "equity aids the vigilant, not those who sleep upon their rights," but it is also true that "equity follows the law" and this seems to be a case for the application of the latter maxim.

The remaining question relates to the time from which damages should be allowed for detention of dower. Should it be from the death of the husband, from the beginning of the adverse possession, from six years back, from demand or from the commencement of the suit? This is often settled by statute, and in the absence of statute some nice distinctions are drawn from varying states of facts, and courts differ greatly. At common law no damages were allowed. But by the statute of Merton, 20 Henry III., C. 1, damages could be recovered from the date of the husband's death, in case the husband died seized. But if the heir pleaded and proved that he was always ready to render dower, damages were allowed only from demand. Generally in the United States the time is either from the death of the husband or else from the date of demand or suit. In some states recovery is made to depend upon whether the husband died seized or not and in other states that makes no difference. In some, recovery against the husband's alienee is allowed only from demand, even though recovery might be had from the heir from the husband's death. See 2 Scribner, Dower, Ch. 25; 3 Sutherland, Dam. 354; 10 Am. & Eng. Enc. of Law, 2nd Ed., 190. To allow in favor of one who, as in this instance, has slept on her rights, and against one who, as here, purchased in good faith, and who might have been in possession for only a short time, damages from the husband's death, in this instance, for some thirty years, does not seem quite right to say the least. That was not allowed at common law and is not required by any statute. Nor is there any rule of law or statutory provision

requiring or permitting an allowance from the time the defendant purchased, say, for about twenty years in this instance. Whether the allowance should be from demand or for six years is perhaps not so clear. Equity, following the law, would not allow damages or an accounting for the profits for more than six years before suit, even if, as held in *Makauhana v. Pua*, *supra*, by a single Justice and apparently without much consideration, a recovery for that period would be allowed at law. When the heir's alienee has purchased and held in good faith and the widow has slept on her rights, equity should not allow a recovery prior to demand. See *Nahaolelua v. Kaaahu*, 10 Haw. 662, and cases there cited. Several other questions are naturally suggested by the findings below on this matter of damages, but, as they have not been raised, we will express no opinion upon them.

The decree appealed from is reversed and the case is remanded to the Circuit Judge for such further proceedings as may be proper consistently with this opinion.

L. Andrews for the plaintiff.

Robertson & Wilder for the defendant Pereira.

HENRY SMITH v. MARY S. ROSE and SANFORD B.
DOLE, as Governor of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED APRIL 22, 1903. DECIDED NOVEMBER 16, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The complainant is not an abutter within the terms of section 354, Civil Laws, and has no right to demand that the land embraced in the abandoned street be first offered to him, at a reasonable price, prior to its sale to another. *Held*, that under the facts of the case the decree appealed from should be reversed and the bill dismissed.

OPINION OF THE COURT BY GALBRAITH, J.

This is a bill in equity filed by the complainant, Smith, seeking the cancellation of a deed executed by the Governor of the Territory conveying to the respondent, Rose, a part of an abandoned street or lane. The land conveyed was triangular in form and contained an area of 1,930 square feet. The Circuit Judge found for the complainant and decreed cancelling the deed as prayed. The respondents appealed.

While the bill alleges fraud in the execution of the deed the complainant relies in the main on his assumed rights as an abutting owner under section 354, Civil Laws, to have the abandoned street offered to him at a reasonable price prior to the sale to the respondent and the failure of the Territorial officials to make such offer. It was denied that Smith was an abutting owner.

The Circuit Judge found that both Smith and Rose were abutting owners and in his decision, said, in part, "In my opinion under the provisions of section 354 the abandoned highway,

prior to disposal by the Government, must be offered to *all* of the abutting owners in compromise without distinction and without reference to the amount or character of damages sustained by each, for a reasonable length of time and at a reasonable price and any offer to one or more abutting owners to the exclusion of other abutting owners is a fraud upon the rights of such other abutting owners and a conveyance made pursuant to such fraudulent offer must be set aside."

Section 354 reads.

"All lands and real property taken for highways or improvements under this Act shall belong to the Hawaiian Government absolutely and in fee simple, and in case a highway or improvement shall at any time be vacated, closed, abandoned and discontinued, the land of such highway or improvements shall be used for the purposes of the Government; provided that in case the same shall be in any way disposed of by the Government, it shall be first offered to the abutters in compromise, for a reasonable length of time and at a reasonable price, and if they do not take the same then it may be sold at public auction."

It seems to have been conceded by all of the parties to this suit that the title to the land conveyed vested in the Territory under section 354, although the record shows that the land was not "taken for a highway or improvements under this Act" and that no proceedings were had to vacate or abandon the "highway" as provided in this act and that the "highway" or foot path of which this land formed a part was abandoned, by those who were accustomed to use it, prior to the passage of "this Act" in 1892. And it was also assumed that the Governor had the right to convey the land under section 354. While these assumptions are not free from doubt and may be entirely unfounded, in fact and in law, for the purposes of this case we shall assume them to be true.

Under the issues presented there is but one difficulty in deciding this case, namely, to determine the proper construction to be placed on that part of the section providing that in case the land embraced in the abandoned highway shall be sold by the Territory "it shall be first offered to the abutters in compromise, for a reasonable price," etc. If the phrase "in com-

promise" were eliminated the difficulty would vanish and the meaning would be plain.

The construction adopted by the Circuit Judge treats the phrase "in compromise" as meaningless and the section as meaning exactly what it would if those words had been omitted. We cannot approve of this construction since we are bound to assume that the legislature had some purpose in inserting the words. The position of the phrase in the sentence seems to warrant the inference that it was used to express the purposes of making the offer and to limit the abutters who were given the right to demand that the offer be made. All abutters on an abandoned or vacated street were not given the right by this statute to demand that the land be offered first to them at a reasonable price before being sold, it was only such abutters as might be injured by the vacation of the highway and thus have a claim for damages against the Territory and whose claim for such damages might be settled or compromised by such offer and a sale in pursuance thereof. To the abutter who was not damaged it would be impossible to make an offer "in compromise." He would have nothing to compromise with the territory for the reason that he was not injured by its acts.

This interpretation does not mean that the land shall be offered to the injured abutter at a reasonable price in exchange or settlement of a claim for damages that an abutter may have on account of the vacation of a street or that the amount of such claim for damages shall be estimated by the Superintendent of Public Works and credited on the price of the land. This of course would be within one meaning of the word "compromise" but the word in this statute is undoubtedly used in another sense, namely, as "an agreement or compact adopted as a means of superseding an undetermined controversy."

Cent. Dic.

"The legislature, by virtue of its general power over the highways of the state, may, as we have said, undoubtedly order the vacation of such of them as it may deem expedient to vacate, but where the vacation of a highway will cause special injury to an adjoining owner he is entitled to compensation. It is

substantially agreed by the courts that the abutter has a private interest in the road or street as such, and if he has this right it is property which cannot be taken from him without compensation. The right to a road or street which the land owner possesses as one of the public is different from that which vests in him as an adjoining proprietor, and it is also distinct and different from his rights as owner of the servient estate. The right which an abutter enjoys as one of the public and in common with other citizens is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street; but with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property it is radically different, for this right is a special one. If this special right is of value—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value. Its value may furnish the standard for measuring the compensation, but it cannot change the nature of the right itself. For this reason, we think that the discontinuance or vacation of a street in such a manner as to prevent access to the property of an adjoining owner is a ‘taking’ of property within the constitutional inhibition and cannot be lawful without compensation to such owner.” Elliot, *Roads and Streets*, 2nd. Ed., Sec. 877.

Of two abutting owners on an abandoned highway, one has the same free and convenient access to his premises after as before the vacation while the access of the other to his premises is entirely cut off. No offer in compromise could be made to the first for the reason that he has sustained no injury and has nothing to compromise with the Territory but between the latter and the Territory there exists “an undetermined controversy” on account of his property taken and his right destroyed by the abandonment of the street. The latter is the abutter to whom the land must be offered before sale and the former although an abutter is not within the terms of the statute and has no rights under it.

The abutter whose access to the highway is cut off by the vacation of the street if the abandoned land goes to a stranger will be injured if not permitted to buy the abandoned portion while if the offer is made to him at a reasonable price for a reasonable time and he purchases he would not be injured.

The evidence shows that the respondent, Rose, was an abutter on the abandoned street; that the land conveyed was between her premises and the highway, Fort Street, and that her only outlet to the highway was over this land; that the complainant was an abutter to a small part of the land but that none of it lay between his premises and Fort Street and that his access to Fort Street was as free and convenient after as before the abandonment; that while it would doubtless have been to Smith's advantage to own the abandoned street in order to enable him to exchange it with Mrs. Rose for another tract of her land which he desired still he was not deprived of any property right by the abandonment of the street or denied any right given him by law by the failure of the Superintendent of Public Works to offer him the land "in compromise."

By the offer in compromise to Mrs. Rose and her acceptance she obtained an outlet to the highway and her claim for damages, that would have accrued had the land been sold to complainant or any other person, was "superseded," i. e., "displaced, supplanted, set-aside, suspended, stayed." The conveyance to her may properly be called, "an agreement or compact adopted as the means of superseding an undetermined controversy." This was the direct effect of the sale to her and in this sense the land was offered to her "in compromise" and she was the only person who was entitled under the statute to such an offer.

The bill should have been dismissed for want of equity. The decree appealed from is reversed and the cause remanded to the Circuit Judge with direction to dismiss the bill and for such further proceedings as may be proper.

E. C. Peters for complainant.

J. W. Cathcart for the Governor.

Kinney, McClanahan & Bigelow for Mrs. Rose.

CONCURRING OPINION OF FREAR, C.J.

I concur in the foregoing conclusion, but express no opinion as to the significance of the words "in compromise" in the statute, except that the construction of those words contended

for by the plaintiff, to the effect that they require the entire land (e. g., a long street that is closed) to be offered as a whole to all the abutters to be divided among themselves in compromise with each other, clearly cannot be sustained. That construction would violate both the language and the spirit of the section and be unreasonable and impracticable. The words "in compromise" in this section are to say the least used somewhat loosely and their meaning is very obscure.

There are several other points in the case which make it doubtful if the desired relief could be granted even if the plaintiff's main contention were correct, but it is unnecessary to consider these.

If the land is not to be offered to all the abutters together to divide among themselves, as is clear, how should it be offered? Certainly not all the land to each abutter in turn. It would be unfair and contrary to the spirit of the statute to offer to one abutter the whole of a tract upon which there were other abutters, and that would be impracticable, for, if the offer were accepted by one, it could not be made to or accepted by any of the others. The only alternative would be to divide the land and offer each part to the abutter on that part. That would be the fair way and evidently the way called for by the spirit of the statute. In most cases there would be no difficulty in doing this with fairness. But, as in this instance, the circumstances might be such as to render it difficult to say just who are the abutters and to what extent. It is clear that Mrs. Rose was at least the principal abutter on the land in question. Nearly if not quite all of it is in front of her lot, while only a short stretch of a side of Mr. Smith's lot borders on it and that not immediately, for a narrow strip along his lot was withheld from Mrs. Rose, perhaps accidentally, and afterwards offered to Mr. Smith. A continuation of this tract in what is known as "Old Lane," which ran between two pieces of Mr. Smith's land, has all been conveyed to him, and, that, too, though Mrs. Rose's lot, for a short distance on one side, bordered on that in much the same way that Mr. Smith's borders on this. The whole transaction cannot be set aside merely because the Superintendent of Public

Works may not have divided the land exactly as the court would. Some room must be left for the exercise of discretion in the execution of the details. No better mode of division than that made has been suggested to the court, and it is not clear that there is any better or fairer.

CONCURRING OPINION OF PERRY, J.

I concur in the conclusion that the bill should be dismissed.

In my opinion the offer contemplated in Section 354 is to be made to all of the abutters, whoever the class so designated may include, that is to say, to each of the abutters the portion on which his land abuts. The words "in compromise" do not, as I think, limit the class of abutters to whom the offer is to be made, but are to be read and understood as though inserted immediately after the word offered, i. e., they were intended to show the nature or the object of the offer and not to describe the permitted purchasers at private sale. Nor does the section permit the construction suggested by one of the respondents that the amount of damages, if any, claimed by an abutter by reason of the closing of the highway, may be deducted from the value of the abandoned strip as fixed by the Government, that is to say, that the words "at a reasonable price" mean at a price reasonable in view of the fact that a counterclaim is being adjusted and settled. I see no reason for giving the words last quoted any other than their ordinary meaning, to wit, "at a fair valuation." Certainly, if, after refusal by the abutters to take at the price named, the land is, under the alternative provision of the statute, sold at public auction, the market price is the price intended and in that event no allowance can be made for any monetary claim against the Government. If it be asked why the words "in compromise" were inserted, I suggest that the most plausible theory is that what the legislature had in mind was a satisfaction of claims, founded on justice if not on law, that abutters might make to the effect that such abutters should be given the first opportunity to acquire the abandoned strip. Of course in a case where the title to the land was not in

the Government and was claimed by the abutters different questions might arise which need not be here considered.

Who are included within the term "abutters" as used in this section is a question the answer to which, as it seems to me, must depend upon the circumstances of each particular case. It will serve no good purpose to attempt a general definition to apply in all cases. Under the circumstances of the case at bar I am of the opinion that the respondent Mary Rose is an abutter upon the strip in question and that the complainant is not. If, as seems to be required by the weight of the evidence, that strip is to be regarded as having been formerly a part of Fort street, then it lies wholly in front of the respondent's land and over it only has the respondent a means of ingress and egress to and from her land. Complainant's land had a complete frontage on Fort street. That for an inconsiderable portion of its southern boundary it adjoins the strip cannot of itself make the complainant an abutter; such a construction of the statute would be repugnant to common sense. How much of the strip, in a southerly direction, is to be offered to the complainant? The whole of it, as seems to have been contemplated in his early correspondence with the Superintendent of Public Works, a half of it, or less? No good reason appears why he should be given a portion of what would naturally be Mrs. Rose's frontage, nor, as I think, does a proper construction of the statute require it.

If, on the other hand, the strip, as seems to be shown by some of the evidence, was a part originally, not of Fort street, but of what was known as Old Lane which continued northerly across the land of the complainant, then even more clearly was Mrs. Rose the only abutter upon this strip. She should be offered the portion running across her land or upon which her land fronts and likewise the complainant should be offered the portion running across his land. The latter portion has been conveyed or offered to the complainant; he alone is an abutter as to that.

IN THE MATTER OF THE APPLICATION OF SANFORD B. DOLE, Governor, GEORGE R. CARTER, Secretary, A. N. KEPOIKAI, Treasurer, J. H. FISHER, Auditor, A. T. ATKINSON, Superintendent of Public Instruction and LORRIN ANDREWS, Attorney General, as the Board of Public Institutions of the Territory, for a Writ of Mandamus against HENRY E. COOPER, as Superintendent of Public Works of the Territory.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 6, 1903. DECIDED NOVEMBER 17, 1903..

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An Act entitled "An Act providing for the organization and government of counties and districts, and the management and control of public works and institutions therein" is invalid as to so much thereof as purports to create a Territorial board of public institutions and to transfer to it matters theretofore belonging to the Territorial Superintendent of Public Works, and with which the counties were to have nothing to do,—in view of Sec. 45 of the Organic Act, which provides "that each law shall embrace but one subject, which shall be expressed in its title."

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from an order denying a writ of mandamus to compel the respondent to deliver to the petitioners the control of all matters relative to harbors, wharves, pilots and towage, and of all property used in connection therewith, and the control and management of the executive and judiciary buildings at Honolulu, as required in terms by Sections 484 and 485.

of Act 31 of the Laws of 1903, commonly known as the County Act.

Chapter 64 (Secs. 380-391) of that Act purports to create a Board of Public Institutions consisting of the Governor, Secretary, Treasurer, Auditor, Superintendent of Public Instruction and the Attorney General of the Territory and to prescribe its powers and duties. It purports to transfer to it many powers and duties which have hitherto belonged to the Superintendent of Public Works. The defense is that this chapter is null and void because it conflicts with the Organic Act and more particularly (1) Sec. 80, which provides that the Governor shall appoint, with the advice and consent of the Senate, certain officers and boards and "any other boards of a public character that may be created by law," in that it creates a board of a public character not appointed by the Governor at all as to two of its members (the Governor and Secretary, who are appointed by the President) nor appointed by him as members of the Board as to any of the members, although all except the Governor and Secretary are appointed by him to their other respective offices; (2) Sec. 45, which provides "that each law shall embrace but one subject, which shall be expressed in its title; (3) Sec. 75, which provides that there shall be a Superintendent of public works with powers and duties over certain specified matters, though subject to modification by the legislature, in that it takes from such Superintendent a substantial part of such powers and duties; and (4) Sec. 46, which provides, among other things, that, except under certain circumstances, a bill, in order to become a law, shall pass three readings in each house and that the final passage shall be by ayes and noes entered on the journal, in that, as contended, the House journal shows merely that the report of the conference committee was adopted by the House in the manner mentioned and does not show that the bill passed third reading in that body.

In sustaining the order appealed from we base our opinion upon the second of these grounds, and express no opinion upon the others.

It is true that the provision of the Organic Act "that each law shall embrace but one subject, which shall be expressed in its title" should be liberally construed, and that an act of the legislature should not be held void on the ground that it conflicts with this provision, except in a clear case. It is sufficient if the various parts of an act have a natural connection, are fairly well embraced in one subject, though somewhat general, and expressed in the title. See *In re Walker*, 9 Haw. 171; *Carter County v. Sinton*, 120 U. S. 517.

But is this the case with the Act in question? Its title is "An Act Providing for the Organization and Government of Counties and Districts, and the Management and Control of Public Works and Public Institutions therein." We presume this title is unobjectionable from the mere fact that it is in two clauses, each of which in form sets forth a separate subject. The mere form is of little consequence. Much room must be left for the exercise of legislative discretion in the wording of the title. It is unobjectionable that to the first clause of the title in question there is added the second in so far as county works and institutions are provided for in the Act, and doubtless these might be provided for incidentally under the first clause if the second were omitted. How far provisions relating to Territorial as distinguished from County matters could properly be included in the Act incidentally or because they could not very well be separated or as declaratory provisions in order to make clear the precise line of separation, we need not say. In this instance the legislature did not attempt to do anything of that kind. It attempted to create a distinctively Territorial board of public institutions and to transfer to it from distinctively Territorial officers matters in respect of which the counties were clearly to have nothing to do and in respect of some of which they in the very nature of the case would have nothing to do. It acted as if the title were "An act providing (1) for the organization and government of counties and districts and (2) the management and control of Territorial works and institutions." This was clearly inconsistent with the provision of the Organic Act above quoted.

Accordingly we must hold that such portions of the County Act as were designed to create a Territorial board of public institutions and to transfer to it duties and powers theretofore belonging to the Superintendent of Public Works is invalid, namely, Chapter 64 of Act 31 of the Laws of 1903, and Sections 484 and 485 and any other portions of said Act necessarily dependent thereon.

The order or decree appealed from is affirmed.

Attorney General L. Andrews for petitioners.

Kinney, McClanahan & Cooper and S. H. Derby for respondent.

KUALA *v.* KUAPAH.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

SUBMITTED APRIL 28, 1903. DECIDED NOVEMBER 19, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an equity suit to quiet title, in which the plaintiff relies on adverse possession, an objection that the title had not previously been determined at law, comes too late when made for the first time in this court and this court should not of its own motion dismiss the bill because of such alleged want of equity.

OPINION OF THE COURT BY FREAR, C.J.

This is a bill in equity to quiet title. The plaintiff admits that the defendant has the record or paper title, but contends that she has acquired a title by adverse possession. The entire controversy, as shown by the pleadings, the evidence, the opinion of the Circuit Judge and the arguments of counsel, turns

on the question of adverse possession. The plaintiff's right or title has not been adjudicated in a court of law. If this is a proper case for equity, then any one claiming by adverse possession may have the question tried and determined in a suit in equity, however plain, complete and adequate the remedy at law may be, and may then also deprive the defendant of a trial by jury. It is clear that this is not a proper case for equity. But has not the question as to whether equity should act in this case been waived by the failure of counsel to raise it, and should this court notice it of its own motion? At the request of the court, counsel have filed supplementary briefs on these points. The defendant, it is true, suggested a want of jurisdiction in his answer and in his notice of appeal, but it does not appear that these suggestions were based on this ground and apparently they were abandoned.

It seems to be pretty well settled that, as it is variously expressed, although neither consent nor negligence will confer jurisdiction in equity where none really exists, yet, when the case is not wholly foreign to equity jurisdiction, when it is not on its face such that equity could have no jurisdiction over it, as, for example, an action to recover damages for an assault, or for a libel or slander, when the defect is a want of equity and not a want of power, when the objection is merely that a plain, adequate and complete remedy at law exists or that equity is without jurisdiction in the particular case merely for some special reason or the absence of some particular element, when equity is competent to grant the relief sought and has jurisdiction of the subject matter, when the case is not without traces of equity jurisdiction, the question of the alleged want of jurisdiction may be waived and will be deemed to have been waived if not raised until the case comes to the appellate court. The latest case by the highest court in the land holding this way, that has come to our notice, is *Detroit v. Detroit Cit. St. R. Co.*, 184 U. S. 365, 381. See also *Reynes v. Dumont*, 130 U. S. 354, 395; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Brown v. Lake Sup. I. Co.*, 134 U. S. 530; *Tyler v. Savage*, 143 U. S. 79, 97; *In re Tyler*, 149 U. S. 164, 181; *Hollins v. Brierfield*

C. & I. Co., 150 U. S. 371, 381; *Insley v. U. S.*, 150 U. S. 512, 515; *Pollock v. Farm L. & T. Co.*, 157 U. S. 429, 554; *Foltz v. St. L. & S. F. R. Co.*, 60 Fed. 316, 322; *Reynolds v. Watkins*, 60 Fed. 824, 825; *Un. P. R. Co. v. Harris*, 63 Fed. 800, 803; *Elder v. M'Claskey*, 70 Fed. 529, 555; *Guar. Co. v. Mec. S. B. & T. Co.*, 80 Fed. 766, 772; *Waterloo M. Co. v. Doe*, 82 Fed. 45, 49; *Schoolfield v. Rhodes*, 82 Fed. 153, 157; *N. Y. & T. L. Co. v. Gulf W. T. & P. R. Co.*, 100 Fed. 830; *C. C. C. & St. L. R. Co. v. Munsell*, 192 Ill. 430; *Larch M. I. Co. v. Garbade*, 41 Or. 123; *Haskell v. Merrill*, 179 Mass. 120; *De Long v. Olsen*, 63 Neb. 327.

The difficulty lies chiefly in the application of the rule. In *Lewis v. Cocks*, 23 Wall. 466, 470, which was practically an ejectment bill to recover the possession of land, the objection was not raised by demurrer, plea or answer, nor was it suggested by counsel, and yet the appellate court noticed it *sua sponte* and reversed the decree below and directed the dismissal of the bill. That case has frequently been cited with approval in later decisions of the same court cited below. See, to the same effect, *Williams v. Fowler*, 201 Pa. St. 336; also *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662, and *McConnell v. Prov. S. L. A. Soc.*, 69 Fed. 113, 115, for other classes of cases in which the court sustained the objection though made for the first time on appeal.

If this were purely an ejectment bill, it may be that this court should dismiss it of its own motion, and perhaps the Circuit Judge should have done so as it is. But this cannot be considered an ejectment bill. The plaintiff alleges that she is in possession and on the whole that must be regarded as the fact. It seems to be practically undisputed that she and her predecessors in title and those claiming under them were in exclusive possession from 1869 to September 6, 1902. Just what the status was from the latter date to the fourth of the following month, when this suit was brought, is not quite clear. It seems to be conceded that the plaintiff was in possession during a portion at least of those intervening few weeks, including the last portion when the suit was brought. Apparently the defendant

claimed that he entered on the sixth of September and remained in possession, with the plaintiff for at least a part of the time, until the suit was brought, though it does not appear how far his claim was based on fact. The Circuit Judge found as a fact that the plaintiff was in possession up to the time of trial and such finding is sustained by the evidence. Under these circumstances we must hold that equity was not wholly without jurisdiction and that the mere fact that the title had not first been adjudicated at law cannot avail the defendant at this stage. See *Perego v. Dodge*, 163 U. S. 160, 164; *Lone Jack Min. Co. v. Megginson*, 82 Fed. 89, 91; *Preteca vs. Maxwell Land Grant Co.*, 50 Fed. 674, 676; *Stout v. Cook*, 41 Ill. 447; *O'Hara v. Parker*, 27 Or. 156; *Culver v. Rodgers*, 33 Oh. St. 537.

As to the merits of the case the question is merely one of fact and the findings of the Circuit Judge appear to be sustained by the evidence. It will serve no useful purpose to review the evidence at length.

The decree appealed from is affirmed and the case remanded to the Circuit Judge.

Robertson & Wilder and *M. F. Prosser* for plaintiff.

S. K. Kaeo and *A. G. Correa* for defendant.

LYLE A. DICKEY *v.* HONOLULU RAPID TRANSIT and
LAND COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 5, 1903. DECIDED NOVEMBER 19, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A passenger on the cars of the Honolulu Rapid Transit and Land Company may not lawfully be charged more than five cents for a continuous ride from the corner of King and Keeaumoku Streets, along King, McCully, Beretania and Alexander Streets to Wilder Avenue. Such a passenger is entitled, without the payment of an extra fare, to transfer from the King Street to the McCully Street line and to receive a transfer ticket therefor.

OPINION OF THE COURT BY PERRY, J.

The plaintiff sues, under section 9 of Act 69 of the Laws of 1898, to recover of the defendant the sum of one hundred dollars for an overcharge alleged to have been made by the defendant on April 7, 1903, while the plaintiff was a passenger on its cars. On the day named the defendant was operating in the District of Honolulu, under Act 69, the following lines of street railway: (1) from Kalihi, along King Street to McCully Street, across the McCully Tract, along Waikiki Road and through Kapiolani Park to Diamond Head; (2) from the corner of Liliha and Wyllie Streets, down Liliha Street, along King, Hotel, Alapai, Lunalilo and Pensacola Streets, along Wilder Avenue and Alexander, Beretania and McCully Streets to King Street; and (3) from Wilder Avenue, along Punahou Street into Manoa Valley. At the corner of McCully and King Streets, the overhead

wires were not connected. The plaintiff entered an east-bound car of the defendant on King Street at the corner of Keeau-moku, paid five cents as his fare and asked for a transfer ticket to a car going *mauka* on McCully Street. This request was refused. At the corner of King and McCully Streets the plaintiff left the King Street car and entered the first car on McCully Street going *mauka* and left the latter at the corner of Wilder Avenue and Alexander Street. While on the last mentioned car the plaintiff was charged and paid an additional sum of five cents as fare. It is for this alleged overcharge that the action is brought. The facts of the case are undisputed and the only question is whether under the provisions of Act 69 the defendant could lawfully refuse to give the transfer ticket demanded and charge an additional fare on McCully Street.

The applicable portion of the Act reads as follows:

“Section 9. 1st. Any person riding upon the cars of said railway shall be liable to pay for such transportation the following rates: For a continuous ride anywhere between Diamond Head and Moanalua, or *makai* of a line drawn parallel to the sea coast, and one and a half miles distant therefrom, not to exceed five cents, provided that children under seventeen years of age in going to and from school, shall not be required to pay over half fares, for which purpose tickets shall be issued.

“2nd. For transportation without said limits such rate shall be charged as said association and others shall, from time to time, fix, subject to the approval of the Governor.

“3rd. Upon a continuous trip, persons riding upon the cars and transferring from one car to another, upon a connecting line within the limits above mentioned, shall be entitled to a transfer ticket without the payment of an extra fare upon the lines of this railway.

“4th. The said association and others shall make reasonable and just regulations with the consent and approval of the Governor regarding the maintenance and operation of said railway on and through said streets and roads; and the said association and others failing to make such rules and regulations, the Superintendent of Public Works with the approval of the Governor may make them. All rules and regulations may be changed from time to time as the public interests may demand at the discretion of the Governor. * * * * *

"If said association and others, or any agent or employee thereof, shall demand or charge a greater sum of money for fare on the cars of said association and others than that fixed by this Act, such association and others, or such agent or employee shall forfeit to the person who is thus overcharged the sum of one hundred dollars, to be recovered in a civil action in any court having jurisdiction thereof."

The ground traversed by the plaintiff in his ride was wholly between Moanalua on the west and Diamond Head on the east and is conceded to have been wholly *makai* of a line drawn parallel to the sea-coast and one and a half miles distant therefrom. It was entirely within the outer geographical limits prescribed by the first subdivision of the section. There is no requirement that each five-cent ride shall be in one general direction. A limitation as to direction may perhaps be inferred from the use of the word "trip" in subdivision 3 and the word "ride" in subdivision 1. It may be that these words of themselves should be held to indicate an intention on the part of the legislature to prevent the taking of a return trip for the one fare (see *Dickey v. Haw. Tramways Co.*, 10 Haw. 387, 390); but it is unnecessary to pass upon that point in this case, for the plaintiff did not attempt to take a return trip. He traveled in one general direction only, away from his starting point, as much so as if he had continued to the Manoa Valley terminus of the line. Nor need we say how much beyond the corner of Wilder Avenue and Alexander Street the plaintiff could have ridden before the company could have lawfully charged him an additional fare; it is sufficient for the purposes of this case to say that the ride which he did take was well within all the limitations prescribed by the statute.

The main argument for the defendant is that to uphold the plaintiff's contention is to enable a passenger to ride "around and around" for a single fare or at least to open the door for fraud of that kind. We do not hold that a passenger may so ride. As to the possible perpetration of fraud, the company is authorized by the statute to make, with the approval of the Governor, reasonable rules and regulations to prevent it and its off-

cers and employees will no doubt be able to devise such rules as will prove effective to carry out that purpose and prevent passengers from riding beyond the point to which they may lawfully ride for one fare.

The plaintiff's ride was a continuous one, and the line to which a transfer was demanded was a connecting line within the meaning of the statute. The mere fact that the overhead wires were not then connected at that corner would not, of course, render the McCully Street line any the less a connecting line (see *Dickey v. Haw. Tramways Co.*, *supra*, and *Haw. Tramways Co. v. Sturdevant*, Ib. 597, 599); nor can the company by a mere rule make a line a connecting one for some purposes and a non-connecting one for other purposes. Its power to make rules is always subject to the limitation that such rules must not conflict with the other provisions of the statute.

The exceptions are sustained, the judgment set aside and the case remanded to the Circuit Court with directions to render judgment for the plaintiff for the amount claimed.

Plaintiff in person.

Castle & Withington for the defendant.

GEORGE II BROWN and FRANCIS HYDE BROWN,
Minors, by their Next Friend, Albert F. Judd, v.
CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED APRIL 24, 1903. DECIDED NOVEMBER 21, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A devisee and her husband formed a corporation and conveyed all their lands to it through a trustee and stock was issued to her, her husband and her children respectively. Held, that, assuming that she took only a life interest and that her children took remainders in fee by the devise, the latter were not entitled to have the conveyances set aside or to have the stock that was issued to the husband and wife transferred to a trustee to pay the income to the husband and wife for her life and at her death to assign it to the plaintiffs, even though the husband and wife claimed to have conveyed the fee, inasmuch as, for one reason, the husband and wife purported to convey only their interests, whatever they were.

The Supreme Court had previously decided that the first devisee took the fee under the will, but the children asked to have that decision declared void as to them on the grounds, (1) that the court was composed in part of two substitute members, although, as contended, the Constitution allowed only one substitute, (2) that it rendered the decision on questions reserved by a Circuit Judge at chambers, although the statute allowed questions to be reserved only by a Circuit Judge in court, (3) that it could not as a court of equity go on and construe the will as to the quantity of estate devised after construing it to the effect that a trust created by it had terminated, and (4) that the rights of the plaintiffs who were infants could not be waived by their next friend. Held, that the

decision was not absolutely void and could not be collaterally attacked even by the infants, and so could not be declared void as to them, even if equity could declare void or even enjoin the enforcement of a decision that was absolutely void on its face.

OPINION OF THE COURT BY FREAR, C.J.

This was originally a bill to declare a trust and for other incidental relief. It was alleged in substance that the defendants C. A. Brown and Irene I. Holloway, who were formerly husband and wife and are the parents of the plaintiffs, conveyed certain lands claimed to have come to the wife under her father's will to a trustee to convey the same to a corporation to be formed; that the corporation was formed and the property conveyed to it; that one-third of its capital stock is held by the said Irene in the name of A. W. Carter, one-third by said Carter as trustee for the plaintiffs and the remaining third by said Brown, except as to one share, which is held for him by defendant Magoon; that certain proceedings were had in court, before said conveyances were made, in which it was decided that the said Irene owned said property in fee (See *Brown v. Brown*, 11 Haw. 47), but that said decision was void for want of jurisdiction, and that the said Irene had only a life estate; and therefore it was prayed that the said defendants be required to assign the stock held by them to a trustee in trust to pay the income of 500 shares thereof to said Irene for life and of another 500 shares to the said Brown for the life of the said Irene, and at her death to assign all of the said shares to the plaintiffs absolutely. The defendants Brown and Magoon demurred and the defendant Irene answered. The Circuit Judge sustained the demurrers on the ground that it was immaterial whether Irene took only a life estate or not, inasmuch as she and her then husband purported, as shown by the copy of the deed which was made a part of the bill, to convey only the lands belonging to them and their right, title and interest by curtesy, dower or otherwise in the lands of each other, &c., and did not attempt to convey any lands belonging to their children, the plaintiffs, even if the latter had the remainder in fee in the

lands in question. In this we concur and so need not consider the remaining thirteen grounds of demurrer.

The plaintiffs then amended their bill, upon leave granted, by alleging in substance that the parties to said conveyances claim that they conveyed the fee, that ownership in fee is claimed and exercised by the corporation, that the stock of the corporation was issued on such claims and represents the value of the fee, and that the defendants claim that the said decision is conclusive on the plaintiffs; and also that in consequence of said decision the plaintiffs have been deprived of trustees as provided under the will, whose duty it would be to preserve the plaintiffs' rights as remaindermen and otherwise protect their interests; and by praying that the said decision and conveyances be declared of no effect as against the plaintiffs. The defendants again demurred and answered respectively; the demurrers were sustained and a decree entered dismissing the bill. The plaintiffs appealed.

It is obvious, as held by the Circuit Judge, that the amendments to the bill do not alter the result in so far as this may be considered a bill to declare a trust. The mere fact that the defendants claimed that Irene received the fee under the will assuming that she really had not, would not justify a decree that she did receive it or convey it or that the defendants should convey it or the stock, which might represent it if she or they had received it, to a trustee.

The further question remains, whether the bill should now be sustained on the theory that it may be considered a bill to remove a cloud. The Circuit Judge held that equity could not give the desired relief because the plaintiffs were out of possession and so had a remedy at law—under the statutory action to quiet title. Ejectment of course would not lie because as remaindermen the plaintiffs would not have a right of immediate possession. *Sylvester v. Sylvester*, 83 Me. 46; *Turner v. House*, 199 Ill. 464. And the statutory remedy to quiet title does not prevent the remedy in equity. *Ahmi v. Ashford*, 12 Haw. 12.

The alleged clouds are the conveyances and the decision—which it is sought to have declared invalid as against the plaintiffs. First, as to the conveyances. Assuming that the grantors had only a life estate, the conveyances would be valid to pass that and so could not properly be declared invalid as to that. And, as to the plaintiffs' remainders, assuming that they had remainders, the court could not, on the theory of removing a cloud, declare invalid as against remaindermen conveyances that on their face purport to convey the unquestioned interest and only the interest of the life tenants. A mere declaratory decree upon the construction of the conveyances, to the effect that they did not pass the fee is not asked for and could not properly be granted, if it were.

Secondly, as to the decision. Of course, even if that could properly be declared of no effect as against the plaintiffs, it would still be true that no trust could be declared as to the shares of stock and yet it is somewhat doubtful if the plaintiffs can be considered as seeking a declaratory decree as to the decision alone, and, if they are, it is not clear on what theory they can rightfully ask for a decree merely declaring a decision to be of no effect as against them, without asking for an injunction or other relief to prevent its enforcement. Equity does not act directly on judgments nor is it a branch of equity jurisdiction to merely construe judgments. Without going into many of the questions of pleading, practice and jurisdiction raised by the defendants in this case, we take it that the plaintiffs cannot obtain the relief desired unless the decision in question is void. No fraud, accident, mistake or surprise is relied on. If the decision were only voidable, equity could not act. Assuming that equity may relieve against a decision that is wholly void or even one that is void on its face, we must hold that the decision in question is not void. It could not be collaterally attacked. The main grounds on which it is contended that the decision is void are: (1) that the Supreme Court which rendered the decision was composed in part of two substitute members in place of two disqualified regular members, but that under the Constitution not more than one substitute

could sit; (2) that the decision was rendered upon reserved questions in equity at chambers but that the statute permitted the reservation of questions in court only, and (3) that there was no jurisdiction to construe the will after deciding that there was no longer any trust in existence. (1) It is at least doubtful whether the constitution (Const. 1894, Art. 83, Sec. 1) did not permit the places of two disqualified members of the court to be filled with substitutes at the same time. The statute clearly did in terms at least. C. L., Sec. 1170. That has been the practice acquiesced in for years under the statute. The court was a *de facto* court and the decisions of a *de facto* court are not void and cannot be questioned collaterally. *Hind v. Wilder's Steamship Co.*, 14 Haw. 217. See also *Ninomiya v. Kupoikai*, ante 273. (2) Granting that the Supreme Court did not have jurisdiction of reserved questions in equity (See *Booth v. Baker*, 10 Haw. 543, and the decision in question, in *Brown v. Brown*, 11 Haw. 47), still was the defect such as to make the decision absolutely void? The court had equity jurisdiction on appeals and it also had jurisdiction of reserved questions in law cases. The defect lies in the method of bringing the question up to this court. The questions were reserved by the Circuit Judge at chambers instead of in court. In our opinion it is not such a defect as renders the decision absolutely void. See *Hind v. Wilder's Steamship Co.*, *supra*, at page 219. (3) We may assume that according to the weight of authority equity should not entertain a bill solely for the purpose of construing a will although a number of courts hold otherwise, and this court has gone far in that direction (see *Hyde v. Smith*, 11 Haw. 535); also that if the court in the former case had jurisdiction at first primarily because a trust was involved and only incidentally of the question of construction it should have declined to answer the latter question when it decided that there was no trust. Still, the decision would not be wholly void. It may have been erroneous without being void. Those are questions on which courts differ. The practice is as determined by the courts in each jurisdiction. If the decision was erroneous in these respects, it was mainly because there was an adequate

remedy at law. But that was a matter that could be waived. See *Kuala v. Kuapahi*, ante 301. And this as well as the other alleged defects above mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least, so as to preclude a collateral attack by the minors. See *Kingsbury v. Buckner*, 134 U. S. 650.

The decree appealed from is affirmed and the case remanded to the Circuit Judge.

A. S. Hartwell for plaintiffs.

Hatch & Silliman, J. A. Magoon and T. I. Dillon for defendants Brown and Magoon.

HARRY W. FLINT v. NINA I. FLINT.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 4, 1903. DECIDED NOVEMBER 25, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An exception to a decision of a Circuit Court in a divorce suit on the ground that it is contrary to law and the evidence and the weight of the evidence, is not well taken when the decision is supported by the evidence.

It is not error for a trial court to sustain an objection to a question on cross-examination on the ground that it is "incompetent, irrelevant and immaterial," if the evidence is incompetent for any purpose.

OPINION OF THE COURT BY GALBRAITH, J.

This is an action for divorce on the statutory grounds of cruelty and habitual intemperance. The Circuit Court found that the evidence was "quite conflicting" and that the libellant had failed to make out his case and dismissed the libel. An exception was saved to the decision of the Circuit Court as well as to other rulings in sustaining general objections to

certain questions propounded to witnesses during the hearing.

It is insisted on behalf of the libellant that the decision of the Circuit Court dismissing the bill was "contrary to law and the evidence and the weight of the evidence" and also that it was error for the judge to sustain the general objection, of "incompetent, irrelevant and immaterial," made to certain interrogatories.

The libellant does not contend that the charge of cruelty was sustained but does insist that the charge of habitual intemperance was established by the evidence.

No useful purpose would be served by setting out the evidence in detail. It is sufficient to state on this branch of the case that the evidence introduced on behalf of the libellant tended to prove the charge and, if it had not been contradicted, possibly would have been sufficient to sustain it and that there was testimony produced by the libellee that tended to show that the charge was false. "Under our statute a decision in a divorce case is like the verdict of a jury in that it cannot be set aside or reversed if there is sufficient evidence to support it," *Bartlett v. Bartlett*, 13 Haw. 707, 713. An examination of the transcript shows clearly that the Circuit Judge was justified in finding that the evidence was "quite conflicting." The decision resulting from this finding cannot under the law be disturbed on the ground set out in this exception.

The exceptions to the rulings on objections to testimony are all of the same character and are based on the same ground, namely, that the court erred in sustaining objections to testimony on the ground that it was "incompetent, irrelevant and immaterial."

The court has the power to exclude incompetent testimony of its own motion with objection (1 Jones, Evidence, Sec. 169; 3 *id.* Sec. 896), and as a matter of course can exclude it when objection is made although the form of the objection may be general. It is possible that the court considered the evidence excluded as immaterial for any purpose. If the ruling was on that ground we find no error in it. If the objection had not been sustained the rulings possibly would not have availed

the libellee on exceptions for the reason that it was too general. *Railway Company v. Parker*, 94 Ind. 91; *Schlereth v. Railway Company*, 115 Mo. 87, 103. No authorities have been cited that sustain the contention of the libellant on this point and we think it unsound.

There is another reason why these exceptions cannot be sustained. The law is well settled in this jurisdiction that the manner of the introduction of testimony and the latitude to be allowed counsel, particularly on the cross-examination of witnesses, is largely vested in the discretion of the trial court and that this discretion will not be reviewed by the appellate court except in clear cases of abuse. *Booth v. Beckley*, 11 Haw. 521; *Merricourt v. Ins. Company*, 13 Haw. 221. The record in this case not only fails to show any abuse of discretion but proves that the trial court allowed to counsel reasonable latitude in the cross-examination.

The exceptions are overruled.

Lorrin Andrews for libellant.

Jno. W. Cathcart for libellee.

THOMAS FITCH, plaintiff in error, v. EDWARD M. WATSON, next friend of Rebecca Panee, defendant in error.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 7, 1903. DECIDED NOVEMBER 25, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A motion to quash a writ of error on the ground that no such suit or proceeding as that described in the writ is now or ever was pending in the court to which it is directed, being supported by the return of the clerk and not controverted, is granted and the writ dismissed.

OPINION OF THE COURT BY GALBRAITH, J.

The defendant in error appeared "specially in his own behalf" and presented a motion to quash the writ issued in this cause on two grounds, namely, (1) Because he is not now and has never been a party to such a proceeding as that described in the writ of error, the notice or the citation served on him. (2) Because there is not now and never has been pending before the Circuit Judge of the First Circuit, at Chambers, in Probate, any such proceeding as that described in the writ of error.

The return to the writ made by the Clerk of the First Circuit Court is as follows:

"As a return to the within writ to me directed, I hereby certify that there is not now pending, nor has there ever been pending, before a Circuit Judge of the First Circuit Court, in Probate or otherwise, any such action or proceeding as that described in and designated by said writ."

This return is not controverted nor is there any showing made that there was a mistake in the description of the cause or the parties, although it was suggested by the attorney for the plaintiff in error, at the oral argument, that there was a mistake in the name of the parties and in the title of the cause as set out in the writ and a request was made to be allowed to amend the writ in these particulars. The facts supporting this suggestion do not appear of record nor are they set forth in a written motion supported by affidavit as required by Rule 6 of this court. Nor does it appear that the writ would have been amendable even if this showing had been made. We could not substitute a new writ for the defective one on this application for permission to amend. This is sufficient reason for denying the request.

Under our statute a writ of error in civil cases issues as a matter of right upon application to the clerk of the court, by "any party to the original cause or of any personal representative of a deceased person" (Section 1448, Civil Laws). It has been held that it is not the duty of the clerk to prepare the writ and that the attorney for the party seeking the writ should "prepare it and see that it is issued." (*Ahin v. Widemann*, 7 Haw. 333, 335.)

If there was a mistake in the preparation of the writ issued in this cause, either in the name of the parties, the title of the case, or otherwise, the plaintiff in error who was acting as his own attorney, is alone responsible for it and has no just cause of complaint if left to bear the burden of his own error, if any.

The motion should be granted and the writ dismissed.

It is so ordered.

W. F. Fleming for the plaintiff in error.

The defendant in error in person.

OAHU RAILWAY AND LAND COMPANY *v.* EWA
PLANTATION COMPANY and KAHUKU PLAN-
TATION COMPANY.

ORIGINAL.

SUBMITTED NOVEMBER 5, 1903. DECIDED DECEMBER 10, 1903.

GALBRAITH AND PERRY, JJ., AND CIRCUIT JUDGE DeBOLT
IN PLACE OF FREAR, C.J., DISQUALIFIED.

A lessee covenanted to pay "all taxes which may be imposed upon" the demised premises during the term and two sublessees in turn covenanted that "all taxes upon the demised premises * * * together with the improvements and crops thereon shall be paid by lessee without claim against the lessor." Held, that the sublessees are liable to pay, in addition to the taxes on their own interest in the demised premises, not only the taxes on the interest therein of the original lessor but also the taxes on the interest of the lessee.

OPINION OF THE COURT BY PERRY, J.

This is a submission on the following agreed facts:

B. F. Dillingham, the holder of a certain lease from James Campbell of the lands and property known as Kahuku and Honouliuli on this island, executed to W. R. Castle a lease of certain portions of Honouliuli and to J. B. Castle a lease of certain portions of Kahuku, and thereafter Dillingham conveyed all of his interest in the first mentioned lease as well as all interests arising thereout to the Oahu Railway and Land Company, and W. R. Castle conveyed all of his interest in the Honouliuli lease to the Ewa Plantation Company and J. B. Castle all of his interest in the Kahuku lease to the Kahuku

Plantation Company. Each of the plantation companies owns a sugar plantation situated on the premises demised to it. The Oahu Railway and Land Company uses a portion of the remaining premises described in the lease to Dillingham as a cattle ranch and has sublet other portions to various persons and corporations.

"III. The Territory of Hawaii acting under and by virtue of Act 31 of the Session Laws of 1896 (Chapter 59, Civil Laws 1897) has assessed and collected the following taxes relative to the premises described in Exhibit A" (the lease to Dillingham) "on the various interests therein or connected therewith:

"(a) To James Campbell and the estate of James Campbell the sum of \$3200 each year from the year 1898 to the year 1902 inclusive, which taxes have been paid in the first instance by said James Campbell or the Trustees of his estate and have been repaid to said James Campbell or the Trustees of his estate by the Oahu Railway and Land Company acting, as is claimed by said Company, under and by virtue of the covenant on the part of the lessee respecting taxes contained in said Exhibit 'A'.

"(b) To The Oahu Railway and Land Company on account of its leasehold interest in all the premises described in said Exhibit 'A' the following sums: Taxes for the year 1898, \$2000; taxes for the year 1899, \$3000; taxes for the year 1900, \$2500; taxes for the year 1901, \$2060; taxes for the year 1902, \$2004.05, which taxes have been paid to the Hawaiian Government by said Oahu Railway and Land Company, acting as is claimed by said company under duress of law and to prevent a tax sale of said premises and to preserve its leasehold estate from forfeiture.

"(c) To Ewa Plantation Company and Kahuku Plantation Company as enterprises for profit under Sec. 820 of said Chapter 59, Civil Laws 1897, various sums in which the value of said lands for cane growing and other purposes were considered, which sums have been paid to the Hawaiian Government by said Ewa Plantation Company and Kahuku Plantation Company, respectively.

"The said Ewa and Kahuku Plantation Companies have always admitted their liability to pay their due proportion of the taxes assessed against James Campbell or James Campbell's Estate on realty and paid to the said James Campbell or

the said James Campbell's Estate by the said Oahu Railway and Land Company. But said Ewa Plantation Company and the said Kahuku Plantation Company deny that they are liable by any covenant in their leases to pay any part or share of the amount assessed against the said Oahu Railway and Land Company as its leasehold interest, as set forth in Section (b) of the foregoing paragraph, and upon demand by the Oahu Railway and Land Company have refused to pay the same or any part thereof."

The question submitted is "whether by virtue of the provisions and covenants" in the leases, "the said Ewa Plantation Company and the said Kahuku Plantation Company are liable to the Oahu Railway and Land Company for any portion or share of the moneys paid as taxes by the Oahu Railway and Land Company to the Hawaiian Government upon its leasehold interest, as set forth in Section (b) of paragraph III. herein."

The lease to Dillingham is for the term of fifty years from January 1, 1890, at a rental of \$20000 for the first year, \$30000 for the second year and \$40000 for each year thereafter, and contains a covenant by the lessee that he "will pay all taxes which may be imposed upon said premises during said term" and a provision authorizing forfeiture in the event of failure by the lessee to perform any of his covenants; that to W. R. Castle is for the term of forty-nine years and eleven months from January 1, 1890, at a rental consisting of a percentage of the produce of the land but to be not less than \$5000 for any one year, and contains a provision that the lessee may, if water for the purposes of a sugar plantation cannot be obtained, surrender the lease without liability for damages therefor and a covenant by the lessee that "all taxes upon the demised premises excepting such portion thereof as shall not have been fenced and taken possession of by the lessee together with the improvements and crops thereon shall be paid by lessee without claim against the lessor"; and that to J. B. Castle is likewise for the term of forty-nine years and eleven months from January 1, 1890, at a rental, not less than \$5000 for any one year, to be ascertained as in the case

of the W. R. Castle lease, and contains a covenant by the lessee that "all taxes upon the demised premises together with the improvements and crops shall be paid by the lessee, his representatives or assigns, without claim against lessor, his representatives or assigns."

It is conceded that the two plantation companies are in the same position, concerning the covenants by the lessees, as their assignors, W. R. Castle and J. B. Castle, would have been in had they not assigned the leases and also, as appears on the face of the submission, that they are liable under the provisions concerning taxes to pay, in addition to the taxes assessed against themselves, the taxes on the interest of the original lessor, Campbell, in the land. The only question is whether they, the two plantation companies, are liable to pay the taxes on the interest of the Railway company in the land covered by the leases to them.

In our opinion, the sublessees are so liable. The main argument against this view is that the instruments executed by Dillingham to the Castles are not in reality leases but merely contracts to establish sugar plantations and that therefore what has been taxed against the Railway Company is its interest in the profits from the production of sugar and not an interest in the land. That what Dillingham executed to each of the Castles was a lease would seem to be settled by the terms of the submission. The parties there allege that Dillingham "executed and delivered to W. R. Castle a *lease* of certain portions of said Honouliuli * * * and also * * * to James B. Castle a *lease* of certain portions of Kahuku * * * and thereafter * * * W. R. Castle also conveyed all his interest *in said Honouliuli lease* to the said Ewa Plantation Company and said J. B. Castle also conveyed all of his interest *in said Kahuku lease* to the said Kahuku Plantation Company * * *. Said Ewa Plantation Company and Kahuku Plantation Company are owners of sugar plantations situated upon the premises *demised* to them respectively." But even if the contention may be made consistently with the terms of the submission, still we are clearly of the opinion that the instruments

in question are leases. In each of them the one party is called the *lessor* and the other party the *lessee*; the apt words, "demise and lease" are used; and the right to the possession, use and profits of the land, for a period of years, is passed and rent, and not merely certain payments in lieu of rent as claimed by the defendants, is reserved as recompense therefor. The covenants and other provisions of the lease all tend to show an intention to make a present demise for the term named.

The railway company has an interest in the land. It has the reversion for the period of one month and was given, in the W. R. Castle lease, the power and the duty to accept a surrender of the property upon the happening of a certain contingency; it has the power to enforce the covenants in the leases; and it enjoys the excess of rents received by it from the sublessees over and above the rent paid by it to the original lessor. That interest is none the less an interest in land merely because our tax statute classifies leasehold interests, for purposes of taxation, as personal property. It is taxable at its full cash value, whatever that value may be; and in the submission the parties state that it is upon the "leasehold interest" of the railway company "in all the premises described in said Exhibit A" (which includes the subleased premises) that the taxes in question were imposed and paid. It seems clear to us that this interest may have a substantial cash value, but what that value is or whether or not it has been overvalued in the past are questions which have not been submitted to us for determination; nor have we been asked to say what proportion of the taxes paid by the railway company upon its interest in all of the land covered by the Campbell lease should be borne by the plantation companies as the tax upon the portions subleased to them.

As we read the subleases, the provision in each of them relating to taxes was intended and is sufficiently expressed to be a covenant, and is not, as claimed by the defendants, merely a direction concerning the method of computation of the share of the profits due to Dillingham or the Oahu Railway and

Land Company. It was the intention of the parties to make it clear that, upon whomsoever the duty and the burden might primarily be as between the government and individuals, *all* of the taxes upon the property subleased, that is to say, upon all three interests, should as between the lessor, the lessee and the sublessees, be paid by the sublessees.

It is no defense that the taxes were not assessed upon the subleased portions of land separately. The private agreement of the parties was not binding on the assessor and the latter was under no obligation to make a separate assessment by reason of such agreement.

The question submitted is answered in the affirmative.

Hatch & Ballou for plaintiff.

Castle & Withington for defendant.

IN THE MATTER OF THE CONTESTED ELECTION
OF NOVEMBER 3, 1903, FOR OFFICERS OF THE
COUNTY OF OAHU.

C. B. MAILE, J. W. BIPIKANE, GEO. MARKHAM,
DAVID KANUHA, WM. KALAEHAO, L. K. SHEL-
DON, A. K. PALEKALUHI, A. ST. C. PIIANAIA,
E. W. PALAU, WM. KAAI, WM. H. KAAUWAI,
JOSEPH KAUI, PETER MAKIA, HENRY MA-
KUAOLE, JOHN K. PRENDERGAST, HULIMOKU
KANIO, G. K. LAANUI, A. W. PAOO, S. K. KANA-
LU, SAMUEL KAILI, KEAWE NAWAHIE, D. KA-
HOALEWAI, W. B. KALEIKUMAKO'A, GEO. HAF-
FEN, AUKAI, G. W. WAIANUHEA, HALALO PU,
D. W. KAMALIIKANE, KAHUILA, IOANE KAHU-

APO, KEWAHIKU, C. A. HERRING, D. KALILI, D. KANAKAOLE, PUHIA, HENRY PELEKANE, WM. PAE, S. K. MAKEKAU, S. K. AKI, KUNIHI, SAM KAOHELE, Petitioners.

MARK P. ROBINSON, JOHN LUCAS, FRANK H. HARVEY, A. HOCKING, J. A. GILMAN, J. M. KEALOHA and S. K. MAHOE, Supervisors; ARTHUR M. BROWN, Sheriff; HARRY E. MURRAY, Clerk; C. P. IAUKEA, Tax Assessor; ISAAC H. SHERWOOD, Auditor; WILLIAM T. RAWLINS, District Attorney; S. E. DAMON, Treasurer; CHRIS J. WILLIS, Surveyor; JOHN EFFINGER (Chairman), HARRY MACFARLANE and STEPHEN UMAUMA, Inspectors of Election, Fourth District, First Precinct; F. P. MCINTYRE (Chairman), ALBERT WATERHOUSE and J. P. KAHAWAI, Inspectors of Election, Fourth District, Third Precinct; A. F. COOKE (Chairman), E. K. LIKALANI and J. MAHONEY, Inspectors of Election, Fourth District, Fifth Precinct; WILL E. FISHER (Chairman), FRED TURRILL and GEORGE E. SMITHIES, Inspectors of Election, Fourth District, Eighth Precinct; H. COBB ADAMS (Chairman), E. L. KAUI and E. P. AIKUE, Inspectors of Election, Fifth District, First Precinct; A. W. CROCKETT (Chairman), J. H. KEANU and JOS. KEKUKU, Inspectors of Election, Fifth District, Second Precinct; W. G. ASHLEY (Chairman), KAUKA WILLIAMS and JOHN E. KAHOA, Inspectors of Election, Fifth District, Sixth Precinct; H. C. BIRBE, JR. (Chairman), JOHN KAAEAE and BENJAMIN KANIEHALAU, Inspectors of Election, Fifth District, Seventh Precinct;

MORENA HULA (Chairman), ASA KAULIA and E. P. SULLIVAN, Inspectors of Election, Fifth District, Eighth Precinct; A. W. NEELY (Chairman), S. H. KAMEAKAPU and C. F. ALEXANDER, Inspectors of Election, Fifth District, Ninth Precinct, Respondents.

ORIGINAL.

SUBMITTED DECEMBER 7, 1903. DECIDED DECEMBER 10, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In view of Secs. 454-455 of Act 31, Laws of 1903 (the County Act), which provide for contests of county elections in general by candidates and in Circuit Courts, such contests cannot be instituted by electors or in the Supreme Court.

In Secs. 465-466 of said Act, which make "all of the provisions of law" applicable to the first county election, those words refer to provisions of law other than those contained in that Act itself, and not to Secs. 454-455 of that Act, which provide for contests of county elections in general by candidates and in the Circuit Courts.

Section 109 of the rules and regulations for holding elections was repealed by the Organic Act in so far as it made the decisions of Inspectors of Elections as to the validity of ballots subject to revision by the Supreme Courts.

Section 8 and the following sections of Act 8 of the Laws of 1894-5 (C. L., Sec. 1092 *et seq.*) relating to contests of elections in the Supreme Court, related to legislative elections alone and were repealed by the Organic Act.

The provisions of law which formerly gave to the Supreme Court jurisdiction in election cases, having been repealed, were not made applicable to the first county election by the provision of the County Act that "all of the provisions of law" should be so applicable.

In construing a doubtful statute, the court may take into consideration the title of the statute, the context, other statutes *in pari materia* and the circumstances under which the statute was enacted.

OPINION OF THE COURT BY FREAR, C.J.

This is a proceeding to contest the election for officers of the County of Oahu held on the third day of November—the first

election under Act 31 of the Laws of 1903, commonly known as the County Act. One of the respondents demurred and most of the others filed pleas to the jurisdiction of this court. The remainder were given leave to answer if the jurisdiction of the court should be sustained.

The laws on the subject of elections in this Territory are in general: (1) the provisions of the Organic Act upon that subject; (2) the rules and regulations for holding elections (C. L., Appendix) specifically continued in force, with certain modifications, by Section 64 of the Organic Act; (3) Act 8 of the Laws of 1894-5, as amended by Act 11 of the Laws of 1896, (relating to election frauds and contests) continued in force by the general terms of Section 6 of the Organic Act, in so far as it is not inconsistent with the Constitution or Laws of the United States or the Organic Act; and (4) the provisions of the County Act, above mentioned, upon the subject of elections, consisting mainly of Sections 427-470 of that Act, which in general purport to make previously existing laws, with various modifications, applicable to county elections.

This proceeding is brought under Section 8 and following sections of Act 8 of the Laws of 1894-5 (C. L., Sec. 1092 *et seq.*) in so far as those sections are made applicable to county elections by the terms of the County Act. There are two portions of the latter Act that bear upon the question. The first is Chapter 82 entitled "Contests," and is a portion of Title 7, which relates to county elections in general. It consists of two sections, as follows:

"Section 454. Save as herein otherwise provided, any candidate for any County office may contest any election therefor in the manner provided by law.

"Section 455. In all contests relative to County officers the petition required by law to be filed in the Supreme Court shall be filed in the Circuit Court in such County, and such Circuit Court shall have such jurisdiction relative to such contests as is given to the Supreme Court by law. It shall report its findings and judgment relative thereto to the Board of Supervisors of the County, which shall have the same powers

relative thereto as are by law vested in the Minister of the Interior."

It is clear that these sections furnish no authority for this proceeding, because, among other reasons, the petition is brought by thirty voters, not by a candidate as required by Section 454, and it is brought in the Supreme Court, not in the Circuit Court as required by Section 455.

The other portion of the County Act bearing upon the question consists of Sections 465-466, which are a portion of Chapter 83 (in Title 8), which provides for this first election under the County Act. These sections read as follows:

"Section 465. All of the provisions of law relating to general elections are hereby declared to be applicable to such election.

"Section 466. All of the provisions of law are hereby declared to be applicable to such election, except that all records or information thereby required to be forwarded to any sheriff, shall instead be forwarded to the Secretary of the Territory."

The first question naturally suggested by these sections is whether the "provisions of law" which they make applicable to this first election refer to or include the provisions contained in the County Act itself upon the subject of elections in general or relate solely to the provisions of law previously in force upon the subject of elections. If they relate to the provisions in the County Act itself they include the provisions of Sections 454-455, above set forth, in which case the latter provisions would require contests as to the first election as well as to elections in general under this Act to be instituted only by candidates and only in the Circuit Courts. But in our opinion the "provisions of law" mentioned, refer only to provisions previously in force. This would be natural. Moreover, the words "provisions of law," as used in Section 465, are qualified by the words "relating to general elections" and the words "general election" are used in other sections of this same chapter as unmistakably applying to Territorial elections alone (see Sections 462-463), and most of the remaining sections in the chapter contain expressions that seem to indicate that the laws relating to Territorial elections alone were intended to be re-

ferred to. Further, the last sentence of Section 455 above quoted tends to show that those sections (454-455) relating to contests were intended to be applicable after there were Boards of Supervisors capable of acting, that is, on and after January 4, 1904 (Sec. 471). And, lastly, the general scheme seems to have been to provide wholly for the first election in chapter 83, and to provide for subsequent elections alone in Title 7 (Chapters 74-82, Secs. 427-455).

The next question is whether, if the words "provisions of law" in sections 465-466 refer solely to the laws previously in force relating to Territorial elections, there are any such laws providing for contests of this kind that could be made applicable to county elections. There are two provisions that are relied on. One is section 109 of the rules and regulations for holding elections (C. L., p. 821), which reads as follows:

"All questions as to the validity of any ballot shall be decided immediately, and the opinion of a majority of the Inspectors shall be final and binding, subject to revision by the Supreme Court as herein provided."

This section in terms provides for a "revision by the Supreme Court" but only "as herein provided." The only part that answers the description "as herein provided" is Section 4 (C. L., p. 787) which reads:

"In case any election to a seat in either house is disputed and legally contested, the Supreme Court shall be the sole judge of whether or not a legal election for such seat has been held; and, if it shall find that a legal election has been held, it shall be the sole judge of who has been elected."

But this provision was expressly repealed by Section 64 of the Organic Act. And, although a similar provision was inserted in that Act as originally drafted, it was finally struck out and the following provision substituted therefor:

"Sec. 15. That each house shall be the judge of the elections, returns and qualifications of its own members."

Whether any portion of said Section 109 remains in force or not, we need not undertake to say, but in our opinion the provision therein relating to revisions by the Supreme Court is not.

The other provision in previous laws that is relied on for contests of elections in the Supreme Court is Section 8 and following sections of Act 8 of the Laws of 1894-5, as amended by Act 11 of the Laws of 1896, (C. L., Sec. 1092 *et seq.*). This provides in terms for contests by thirty qualified voters, as well as by candidates, and in the Supreme Court, and sets forth what may be contested and the procedure. The only question is whether this provision was in force when the County Act was enacted, so as to be capable of being made applicable to this county election by a general provision that "all of the provisions of law," &c., should be so applicable. In other words, was this a provision of "law" at that time? There can be no doubt that it was repealed by the Organic Act in so far as it provides for contests, in the Supreme Court, of elections of Senators and Representatives, for that Act, as already stated, expressly repealed the provision of the rules and regulations for elections which made the Supreme Court judge of legislative election cases, and expressly conferred such jurisdiction upon the respective houses of the legislature. It also (in Sec. 7) expressly repealed the Constitution of the Republic, which contained a provision similar to that just referred to in the said rules and regulations, and (in Sec. 6) continued in force only such laws as were not inconsistent with the Organic Act. Under a provision "that each house shall be the judge of the elections, returns and qualifications of its own members," the jurisdiction of each house is exclusive. *Harris v. Cooper*, 14 Haw. 145, 148; *Bingham v. Jewett*, 66 N. H. 383; *Wheeler v. Board*, 94 Mich. 448. Cases of this kind must be distinguished from those in which the courts merely require executive officers to perform ministerial duties under the election laws, which is not a usurpation of the jurisdiction vested in the respective houses of the legislature, but is often an aid to that jurisdiction. *Id.* To make the jurisdiction of the respective houses of the legislature exclusive it is not necessary that there should be a provision that each house shall be "sole" judge, or that there should be other equivalent words. Even if it were necessary ordinarily that there should be words of exclusion in order to

exclude the jurisdiction of the courts, it is clear in this case from all the action taken by Congress that it was the intention of Congress to exclude the jurisdiction of the courts. It may be added that if the petitioners were obliged to rely merely on the general jurisdiction of the courts in election cases in so far that is not clearly taken away, they would not properly be in this court. In such case they should have applied to a court of general original jurisdiction, not to an appellate court.

Since therefore the provisions now relied on in Act 8 of the Laws of 1894-5 (C. L., Sec. 1092 *et seq.*) were not in force so far as elections of members of the Legislature were concerned when the County Act was enacted, it remains to be considered whether they were in force as to other elections, if any. This seems to us to be the crucial point in this branch of the case. Sections 465-466 of the County Act, which are relied on, merely make applicable to county elections the provisions of law then in force as to other elections. The only provisions of law relating to other elections which permit election contests in the Supreme Court have been repealed in so far at least as elections to the Legislature are concerned. If these provisions related solely to elections to the Legislature, they have been repealed *in toto*. If they did not relate to other elections, if any, at the time, they are not now made applicable to county elections. They were undoubtedly enacted with special reference to elections to the Legislature. There were no other elections provided for at that time or contemplated. There were no county or municipal governments here and none were contemplated at that time. And yet, may not an Act passed primarily for legislative elections be broad enough to apply to other elections, when they may be provided for, even though there were no other elections at the time, to which it was applicable, and no elections at all—even legislative elections—to which it could apply during a certain period—in this instance, from the enactment of the Organic Act to the enactment of the County Act—and even though the Legislature did not contemplate any other elections at the time? Let us assume that that would be possible. But was such the case here?

Said Act 8 consists of two parts. One part includes the first six sections and relates to offenses against the election laws. It is Chapter 86 of the Penal Laws. That part clearly was not repealed by the Organic Act, even as to legislative elections and doubtless is made applicable to county elections by the terms of the County Act, even if it would not be applicable of itself. The other part includes the other ten sections and relates to contested elections. It is Chapter 77 of the Civil Laws.

The title of the Act is, "An Act Relating to Elections and Contested Seats in the Legislature." There is no doubt that the portion of this title which relates to "contested seats" is limited to contested seats in the Legislature. If the portion relating to "elections" is likewise limited by the words "in the Legislature" there is an end of the whole matter. But let us assume that it is not so limited, and that the title may be read as if it were, "An Act Relating to All Elections and to Contested Seats in the Legislature." If the title were merely, "An Act Relating to Elections," meaning "all elections," it would be broad enough to include contests of all such elections. Whether the addition of the last portion of the title necessarily limited, under the constitutional provision then in force as to titles of acts, the part of the Act relating to contested seats to contests as to legislative elections we need not say. Let us assume that the words "and contested seats in the Legislature" in the title may be regarded as surplusage and that the first part of the title "relating to elections" is broad enough to cover contests of any or all elections, so as at least to prevent our holding that the Act violated that constitutional provision, so far as contests of other than legislative elections are concerned. Still, can the Act be read as desired by the petitioners, as a matter of construction?

Looking at the question merely as one of construction, the "title may be resorted to for the purpose of ascertaining the meaning of the body of the Act; but especially is this true" when there is a provision like that found in Section 45 of the Organic Act. *Myer v. Car. Co.*, 102 U. S. 1, 12. The title

in the present case certainly goes very far to show that only contests of legislative elections were intended. Furthermore, as already stated, there were no other elections provided for or contemplated when the Act was passed. There were, moreover, no laws that could apply of their own force to any other elections at that time, even if other elections should be provided for. The provisions on elections, which were quite extensive, in the Constitution of the Republic, then in force, by their own terms clearly applied to legislative elections alone. The rules and regulations for holding elections likewise applied exclusively to legislative elections. For instance, in Section 1 (C. L., p. 786) it was provided that " 'Election' shall refer to and mean any election for Senators or Representatives herein provided for." Similarly as to "candidate." *Id.* Looking at the portion of Act 8 itself relating to contested elections, we find, all through, the nomenclature of the provisions of the constitution and of the said rules and regulations relating to elections, and references to said rules and regulations and seats in the Legislature, and the first section of this portion of the Act (C. L., Sec. 1091), which sets forth the causes for vacating a seat, clearly refers to legislative elections alone. This portion, indeed, seems to have been intended to provide a procedure for the exercise of the new jurisdiction—that over election cases—then recently transferred by the Constitution from the respective houses of the Legislature to the Supreme Court. It is doubtful if the Legislature would have conferred similar original jurisdiction on the Supreme Court over county election contests even if there were county elections then. It is true that the Act contains some expressions that are general in their terms and that taken by themselves might cover county elections, but there was no occasion to expressly confine them to legislative elections under the circumstances, and they must be read in the light of the other parts of the Act, its title, other laws *in pari materia* and the circumstances under which the Act was passed. Taking all these things into consideration, it is our opinion that the Act was not intended to apply to contests other than those arising out of legislative elections, and

that such intention is sufficiently expressed, and that the court is without jurisdiction in this case.

The petition is dismissed with costs.

T. McCants Stewart and C. W. Ashford for petitioners.

Deputy Attorney General E. C. Peters and *W. T. Rawlins* for respondents, except as follows:

H. Hogan for H. C. Birbe, Jr.; *E. M. Watson* for F. Harvey; *W. A. Whiting* for C. P. Iaukea.

CHARLES A. BROWN v. ALFRED W. CARTER, ALFRED W. CARTER, Trustee for Irene Ii Holloway, George Ii Brown and Francis Hyde Brown, IRENE II HOLLOWAY, GEORGE II BROWN, an infant, FRANCIS HYDE BROWN, an infant, and THE JOHN II ESTATE, Limited, a corporation.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED APRIL 24, 1903. DECIDED DECEMBER 12, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Notice of a corporation meeting should be reasonable in the absence of a special provision as to what notice should be given.

A stockholder who attends and takes part in a meeting without objecting to the shortness of the notice cannot afterwards question the validity of the meeting on that ground.

Stock may be voted by proxy though its owner is present and voting other stock held in trust.

An objection raised by a woman that she was a married woman when she became one of the five persons who formed a corporation, her then husband being another of the five, cannot avail when raised collaterally and for the purpose of avoiding a part only of the articles of association.

When a husband and wife jointly conveyed their property to a trustee to convey it to a corporation when formed on certain terms, and the corporation was formed and the property was conveyed, and stock was issued to the husband, wife and their (minor) children respectively, certain of the provisions contained in the articles of association in accordance with the terms of the trust deed, and which are claimed to be harsh or improvident cannot be avoided on the ground that a married woman could not through a trust deed authorize a trustee to enter into such terms as against herself and the minors.

Semble, a corporation may bind itself in the articles of association to retain one of its members as its treasurer and manager so long as he owns not less than one-fourth of the stock, (and by implication so long as he properly performs the duties of those offices) subject to removal or alteration of the articles only by a vote of three-fourths of all the stock, notwithstanding a general statutory power to make by-laws for the management of its property, the election and removal of its officers, &c.

Assuming that such a provision in the articles would be binding, it does not necessarily follow that equity would specifically enforce it by injunction, and, when, as in this instance, certain by-laws have been adopted, the enforcement of which against the plaintiff, it is contended, would violate such provision in the articles, but when such by-laws are reasonable except as against any rights that may have become vested, and no attempt has been made to enforce them as against the plaintiff, and many nice questions of law are involved as to the construction of the articles and by-laws, equity will refuse to go through them for the purpose of determining just how far the corporation and the plaintiff may go in various directions under hypothetical conditions and enforcing its construction by injunction, especially in view of its reluctance to interfere with the management of corporations or to grant injunctions except in clear cases or to specifically enforce hard contracts.

OPINION OF THE COURT BY FREAR, C.J.

This is a bill to enjoin the defendants from acting under or enforcing certain by-laws of the defendant corporation and from acting in conflict with certain rights, powers and duties claimed to have been conferred on the plaintiff by the articles of association of the said corporation. The Circuit Judge overruled general demurrers filed by the respective defendants and after a

hearing upon their answers found for the plaintiff and granted the injunction. The defendants appealed.

The principal facts are these: The plaintiff and the defendant Irene Ii Holloway (*nee* Irene Ii) were formerly husband and wife and the defendants George Ii Brown and Francis Hyde Brown are their children. The plaintiff claims to have become entitled under former laws, for the term of his said wife's life and during the minority of their said children, to the custody, use and usufruct, rents, issues and profits of all property of a fixed and immovable nature belonging to his said wife before her marriage to him or accruing to her thereafter during such marriage. On July 2, 1897, as a preliminary step towards forming the defendant corporation, the plaintiff and his said wife joined in a conveyance of said property to one Henry Holmes in trust to convey the same to the said corporation when formed in accordance with the terms of the said conveyance. The corporation was formed July 9, 1897, the articles of association containing most of the said terms, and the property was conveyed to it by the trustee. The 1500 shares of stock of the corporation of the par value of \$100 each, were issued, 499 to the plaintiff, 499 to Henry Holmes as trustee for the two children, 499 to Henry Holmes as trustee for the wife, 1 to J. A. Magoon, 1 to Henry Holmes and 1 to S. M. Ballou. The 998 shares issued to Henry Holmes as trustee were afterwards transferred to the defendant A. W. Carter as trustee for the same beneficiaries and the one share issued to S. M. Ballou was assigned to said A. W. Carter. On September 9, 1902, at a meeting of the stockholders called by said Carter, who was president of the corporation, certain by-laws were adopted. The plaintiff's contention is that certain of these by-laws are invalid as being inconsistent with certain rights claimed by him under the articles of association.

The provisions in the articles to which special attention is called are the following: No extension of the capital stock "shall be made except upon a vote of the shareholders of the company holding not less than three-fourths of all the shares of the company. * * * * * The officers other than the Auditor shall be the Directors of the company. The officers of the com-

pany shall be as follows: Henry Holmes, President; J. A. Magoon, 1st Vice President; Irene Li Brown, 2nd Vice President; C. A. Brown, Treasurer and Manager, and S. M. Ballou, Secretary. The Auditor shall be appointed at the first meeting of the shareholders after the incorporation. The officers and directors shall continue to hold office for one year and thereafter until their successors are appointed. The officers of the company other than the auditor shall be appointed by the shareholders representing not less than three-fourths of all the shares of the company. The auditor need not be a shareholder of the company. He shall not be appointed by shareholders representing a majority of all shares of the company. * * * Said corporation shall have power * * * to buy, sell, lease, mortgage, exchange and otherwise manage any real and personal estate * * * but no real estate belonging to the company shall be mortgaged, conveyed or sold except by a vote of the majority of the directors of the company. * * * To make by-laws not inconsistent with these articles for the management of the property, election and removal of its officers, and the regulation of its affairs and transfer of its stock as the business of the corporation shall from time to time require. * * * The treasurer and manager if and while he shall be a shareholder of the company holding not less than one-fourth of all the shares of the company shall have the sole and exclusive charge, care and control of all the real and personal property of the company, all moneys that shall be due, owing or payable to the company shall be receivable by him and all moneys that shall be due, owing or payable by the company shall be disbursed by him and he shall perform such other duties as generally attach to the offices of treasurer and manager. Any limitation on the above powers shall be made only by a vote of the shareholders of the company holding not less than three-fourths of all the shares of the company."

The provisions of the by-laws that are claimed to be invalid and inconsistent with the articles are as follows:

"Article 4.

"Officers.

"Sec. 1. The officers of the corporation shall all be residents of the Territory of Hawaii, and shall consist of six persons, to wit: A President, a First Vice-President, a Second Vice-President, a Treasurer and Manager, a Secretary, and an Auditor.

"Sec. 2. No officer shall absent himself or herself from the Territory of Hawaii for a period of more than three weeks at any one time without the consent of the stockholders holding at least a majority of all the shares of the company. Any officer violating this section shall be subject to removal from office by the stockholders holding at least a majority of all the shares of the company.

"Sec. 3. In case of the violation by any officer of Section 2 of this Article the stockholders holding at least a majority of all the shares of the company shall have the right at a meeting of the company duly called for that purpose to declare vacant the office held by such officer and to appoint another person to hold such office.

"Sec. 4. If any officer shall absent himself from the Territory of Hawaii for a period of not more than three weeks at any one time, or shall absent himself from the Territory of Hawaii for a period of more than three weeks with the consent of the stockholders holding at least a majority of all the shares of the company, the stockholders holding not less than a majority of all the shares of the company shall thereupon at a meeting called for that purpose appoint some other person to perform until the return of such officer all the duties of such office.

"Sec. 5. No officer shall delegate the duties of his office to any other person.

"Article 5.

"Election.

"Sec. 1. The officers shall be elected at each annual meeting or at any special meeting duly called for that purpose, and a vote of not less than three fourths of all the shares of the corporation shall be required to elect an officer, other than the auditor, except as otherwise provided by Article 4. * * * *

"Article 7.

"Sec. 1. The company shall have a Board of Directors which shall consist of all the officers other than the Auditor,

and the Board shall have the management, direction and control of all the business of the corporation under its Articles of Association and these By-Laws. * * *

“Article 8.

“Treasurer and Manager.

“Sec. 4. (a) The Treasurer and Manager shall perform all duties usually appertaining to the office of Treasurer and Manager and such other duties as are imposed upon him by the Articles of Association and these By-Laws. He shall, however, in all affairs of importance, consult and be guided by the advice of a majority of the Board of Directors.

(b) The Treasurer and Manager shall give a bond to the Company with two sureties approved by the Board of Directors for the faithful performance of his duties and the delivery to the Company of the property in his care and custody upon his resignation, removal or termination of office in a sum to be fixed by the Board of Directors.” * * *

“Article 11.

“In case of any violation by any officer of these By-Laws the stockholders holding at least a majority of all the shares of the Company shall have the right at a meeting called for the purpose to expel such officer from such office as a punishment for such violation, and to elect some other person to fill said office.”

Several minor contentions on each side will be disposed of first. On behalf of the plaintiff it is urged that none of the by-laws can stand for the reason that the notice of the meeting at which they were adopted was unreasonably short. There was no provision whatever prescribing what notice of meetings should be given. There were previously no by-laws at all. In the absence of a definite provision the notice should be reasonable. It seems that on several occasions during the three weeks preceding the meeting, Mr. Carter, the President, told Mr. Magoon, who apparently was supposed to represent Mr. Brown also, that by-laws were being prepared and that he expected to call a meeting soon for their consideration. Mr. Magoon told this to Mr. Brown. The absence first of Mr. Brown and then of Mr. Carter prevented calling a meeting earlier. About one hour's notice was finally given. All the stockholders were

present. Messrs. Magoon and Brown protested against the adoption of the proposed by-laws on the ground, among others, that they ought not to be railroaded through, that no opportunity had been given to examine them, and that they should first be referred to a committee to report upon them at a future meeting. Mr. Carter then proposed that they be taken up section by section or that there be an adjournment for a few days so as to give ample time to examine them. Messrs. Magoon and Brown apparently did not care for an adjournment unless for such time as would enable Mr. Brown to first take a trip to California. The by-laws were then passed, Messrs Carter as trustee, representing 998 shares, and A. A. Wilder by proxy for Mr. Carter, representing one share, voting in the affirmative, and Messrs. Brown and Magoon, representing 499 shares and 1 share respectively, voting in the negative. The share obtained by Mr. Carter from Mr. Ballou, not having been transferred on the books, was not voted. Assuming that the notice was unreasonably short, it seems to us that the plaintiff must be taken to have waived the defect by attending and taking part in the meeting and voting on the question of the by-laws without any specific objection to the shortness of the notice. He objected to the adoption of the by-laws on the ground that he had not been given an opportunity to examine them before the meeting but did not object to the shortness of the notice of the meeting.

Another contention for the plaintiff is that Mr. Wilder could not vote by proxy for Mr. Carter when the latter was present and that the latter could not split up his stock so as to vote a part himself and have another part voted by proxy. The presence of the owner of the stock would not prevent its being voted by proxy. Under the statute, members may "vote either in person or by proxy." C. L., Sec. 2012. And, even if one could not vote part of his stock in person and part by proxy when held in the same right, he might, as was the case here, vote in person stock held in one capacity, that is, as trustee, and by proxy stock held in another capacity, that is, in his own right.

On behalf of the defendants it is contended that the corporation was not legally formed because one of the five persons who signed the articles of association, as required by the statute, was incompetent because she was a married woman. Assuming that a woman married before the Married Woman's Act of 1888 was passed could not thus enter into contract with her husband and others, still the defendants cannot be allowed to set this up now. The then wife has long been divorced from the plaintiff and even now does not seek to repudiate the act of incorporation *in toto*. She merely seeks to avoid the burdensome features while attempting to hold to those that are advantageous. Further, a defect of the kind relied on cannot be raised collaterally as it is now raised.

Another contention for the defendants is that, looking upon the provisions of the articles now in question as part of a contract between the incorporators, it is invalid because the trustee to whom the property was first conveyed in trust could not be authorized by a married woman, one of the grantors, to enter into such a contract on behalf of the married woman and minor children. We see no reason why the husband and wife could not join in a trust deed to a third party or why such third party could not then carry out the trust. He could not very well carry it out in part, in so far as it was favorable to the wife and children, and not as to what was unfavorable to them. In so far as the children were concerned, what they got was in the nature of a gift and no objection can be based on their incapacity.

We now come to the main questions—that of the validity of certain of the by-laws in view of the special provisions of the articles of association and that of the appropriate remedy. These are not easy questions and there is upon them very little authority of a satisfactory nature.

It is urged in support of the by-laws, first, that they are not inconsistent with the articles and, secondly, that, if they are inconsistent with the articles, they are nevertheless authorized by the statute, which, of course, prevails over the articles.

The company was incorporated under the general corporation law by filing articles of association and an affidavit setting

forth certain facts as required by the statute, whereupon by the provisions of the statute it became a corporation with the powers granted to corporations by law. C. L., Ch. 128. No doubt the articles must be construed strictly and the corporators could not confer upon themselves powers in addition to those granted by law by inserting them in the articles. *Oregon R. & Nav. Co. v. Oregonian R. Co., Ltd.*, 130 U. S. 1; *City of Danville v. Danville W. Co.*, 178 Ill. 299. And a by-law may be valid if authorized by statute though inconsistent with the articles or charter. *Booz's Appeal*, 109 Pa. St. 392. Moreover the statute expressly provides that "every corporation created, or to be created in this Territory shall have power: * * * 6th, to make by-laws not inconsistent with any existing law, for the management of its property, the election and removal of its officers, the regulation of its affairs, and the transfer of its stock." And in the absence of the statutory provision a corporation aggregate may make by-laws as an inherent or incidental power.

But what is the conclusion from all this? Does it follow that all provisions in the articles other than those required by the statute are null and void, or that a corporation can make by-laws without restriction except as found in the statute? The statute, while it requires the articles to contain certain particulars, does not say that it shall not contain others, and others are constantly inserted in practice, whether properly or not. Should not such provisions avail so long as no attempt is made by the corporators to take upon themselves powers not authorized by law? The articles are the fundamental agreement among the corporators and between them and the corporation as well as in the nature of a charter of powers from the Territory. Why should not provisions contained therein other than those required by law but not inconsistent with law have force as parts of a contract between the corporators and even between the corporation and its members though not necessarily between the Territory and the corporation? And why should not the corporators be permitted to contract as they please so long as they

do not attempt to violate the law or public policy or interfere with vested rights?

There is much difference of opinion as to what by-laws a corporation may preclude itself from making or what circumstances do preclude it from making or enforcing particular by-laws and what not? See Boisot, By-laws, Secs. 118-130, and cases there cited. A by-law may stand under certain circumstances or for certain purposes and not under other circumstances or for other purposes. For instance, if under the by-laws of a mutual benefit society a member is entitled to certain benefits upon becoming ill, and the by-laws are amendable, even those courts which hold that the by-laws may be amended after a member becomes ill, so as to reduce his benefits thereafter—on the theory that the liability to amendment is part of the original contract entered into voluntarily by the member—also hold that the amendment cannot affect benefits already accrued, which have become a debt to him from the corporation. His vested rights cannot be impaired by the exercise of the power to amend, though he agreed upon becoming a member that the by-laws might be amended. So, if the legislature has reserved the power to amend a charter, even those courts which hold that an amendment in a material respect authorized by the legislature might be accepted by the corporation, that is, by a majority of its stock, and against the will of the minority, notwithstanding the original agreement of incorporation for certain named purposes—on the theory that the liability to amendment is part of the original contract entered into voluntarily by all the members—also hold that an obligation entered into by the corporation prior to such amendment cannot be impaired thereby. See *Pain v. Soc. St. J. Baptiste*, 172 Mass. 319; *Durfee v. Old Colony, &c., Co.*, 5 Allen 230; *Lloyd v. Supr. Lodge*, 98 Fed. 66; *Pepe v. City, &c., Soc.*, (1893) 2 Ch. 311; *Smith v. Galloway*, (1898) 1 Q. B. 71. So, although, a corporation may make by-laws with respect to the election or appointment and removal of its officers, it may enter into a contract to engage one to serve it for a fixed period so as to deprive itself of the power by a by-law or otherwise to remove

such officer during such period except for cause. And it is even intimated that it may do so in the face of a statutory, charter or by-law provision existing at the time to the effect that officers may be removed at any time. See *Douglass v. M. Ins. Co.*, 118 N. Y. 484, and cases there cited, and, *contra*, *Trustee v. Strong, Hopk.* (N. Y.) 278; *Darrah v. Wheeling I. & S. Co.*, 4 S. E. (W. Va) 373. Again, when it is said that a corporation may make, alter or repeal by-laws, it is meant that the holders of a majority of the stock represented at a duly called meeting may act, and yet might it not be provided in the articles or by-laws themselves that the latter should not be added to, amended or repealed except upon notice given at a previous meeting or except by a majority of all the stock in the corporation or by two-thirds or three-fourths of all the stock represented at a meeting or two-thirds or three-fourths of all the stock in the corporation? This is constantly done without question as to its propriety or validity. Such by-laws seem reasonable and the corporation may make reasonable by-laws. And the corporation may often, especially by unanimous consent, bind themselves by contract where they alone as distinguished from the state, are concerned, regulating the manner in which they shall exercise the powers conferred by statute. See *Kent v. Quicksilver M. Co.*, 78 N. Y. 159, 185. If the incorporators should agree not to make, alter or repeal by-laws except by a three-fourths vote, the corporation could still exercise its statutory power to make by-laws. It would merely act by a three-fourths instead of a majority vote. Indeed, in making such a by-law it might be regarded as acting in the exercise of this very power to make by-laws. And is not this power given primarily for the benefit of the incorporators and cannot they renounce it in so far as it is for them and their action does not affect the rights of others, and is not contrary to the public good? C. L., Sec. 7. What is a reasonable by-law depends largely on the circumstances. The by-laws in question, we presume, would be reasonable under ordinary circumstances and they may be reasonable now as to some of the officers of the corporation, but are all of them reasonable as respects the plaintiff

in view of the original contract entered into by all the corporators in the articles of association?

The corporators may bind themselves by contract in the articles or outside the articles as well as in what they may prefer to call by-laws, as to their methods of dealing with officers. Under certain circumstances it is immaterial whether they call an instrument articles, charter, constitution, contract or by-laws. See *Supreme Lodge v. Knight*, 117 Ind. 489, 495. In the present case the agreement relied on by the plaintiff was part of the fundamental agreement of the corporators. It was embodied in the preliminary deed to the trustee, to whom the plaintiff conveyed his property on the express understanding that he was to be secured the rights he now claims or some of them. It was also embodied in the articles of association—by the unanimous consent of the original stockholders. It related to matters that were within the scope of the powers of the corporation and its members—the appointment of its officers and the management of its property. No doubt the agreement was one that it would ordinarily be unwise to make and one that ought not to be favored. It was perhaps a hard exaction on the part of the plaintiff, but apparently he was unwilling to surrender his rights in the property except upon that condition, and if the contract was lawful it cannot be impaired or violated with impunity merely because the defendants find the provisions vexatious. There is a great difference between a fundamental agreement entered into by all at the outset specifying the conditions under which alone the parties consent to embark and a mere by-law made subsequently by a majority vote. A case like the present in certain respects in *Loewenthal v. Rubber R. Co.*, 52 N. J. Eq. 440. That was a bill to restrain a change in the certificate of organization and by-laws, which a majority of the stockholders proposed to make. Such change was expressly authorized by statute to be made by such majority—apparently in the exercise by the legislature of its reserved power over corporations. The corporation had been formed by the union of five companies engaged in the same class of business. They at the outset unanimously adopted a by-law

authorizing cumulative voting and providing for amendments, additions and repeals only by a two-thirds vote of the whole capital stock. The object was to secure to each of the five combining companies representation on the board of directors of the new corporation. The court held that the by-laws were part of the fundamental agreement and could not be altered except in the manner therein provided or by the consent of all the stockholders. The present case is perhaps a stronger case than that in some respects, though weaker in other respects, for in that there was a question of the exercise of the reserved power of the legislature, while here there is no attempt to exercise any power of alteration expressly reserved either by the legislature or by the corporation, and so we need not enter into the controversy referred to in that case, the two sides of which are so well championed by the Massachusetts and New Jersey courts respectively. The former in *Durfee v. Old Colony &c. Co.*, *supra*, held that when the legislature reserved the power of alteration, the corporation, that is, a majority, could accept an alteration against the wishes of the minority, on the theory that the power to alter was part of the contract into which all entered and that an alteration made by one party, the legislature, could be accepted by the other party, the corporation, which, of course, acts by a majority, to all which the New Jersey court replied (in *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J., Eq. 178) that in so far as an alteration could be made at all by mutual consent of both parties it could be made without any reservation of power, and in so far as it could be made at all by virtue of the reserved power of one party it could be made by that party alone without the consent of the other. See 2 Cook, Corp. Sec. 501; 1 Sl. & M., Corp., Sec. 57. It may be that the Legislature in the exercise of its reserved power may impose additional duties and powers upon a corporation without its consent within certain limits, and make the acceptance of the amendment a condition of the continued exercise of corporate powers by the corporation, especially in respect to matters that concern the state, but that a mere grant of additional powers cannot be accepted except by unanimous consent

of the stockholders when it is without the scope of their original contract with each other. Some members cannot of their own will alone retreat from an original contract into which they have entered voluntarily with all the others, nor can a corporation at pleasure annul a contract into which it has entered with its members. The mere power to make by-laws, though conferred upon the corporation by the legislature at the outset, did not deprive it of the right to make certain contracts or by-laws within the scope of its powers, so as to bind it. And, as we have seen, it is expressly provided by statute that "individuals may, in all cases in which it is not expressly or impliedly prohibited, renounce what the law has established in their favor, when such renunciation does not affect the rights of others, and is not contrary to the public good." C. L., Sec. 7.

Assuming, then, that the articles of association are valid and binding, and that the by-laws are, in part at least, inconsistent with the contract contained in the articles, between the corporation and the plaintiff, and that the corporation cannot with impunity violate it, does it follow that the corporation may not remove the plaintiff from his office or that an injunction should be granted against the enforcement as to him of the by-laws in question? One party to a contract cannot impose new terms on the other in the absence of a reserved power to do so. But the contract in this case is not to keep the plaintiff as its treasurer and manager, &c., &c., under all circumstances. He has duties to perform as well as privileges to enjoy. Ordinarily, if an employee violates his contract, the employer is absolved from his obligation and may discharge him, and even when a discharge is made without cause, equity as a rule does not interfere but leaves the complaining party to his remedy at law. And so it is said that corporations may discharge officers for cause and even without cause subject to liability for damages—even when their terms of office are fixed. See 3 Cl. & M., Corp., Secs. 664, 666; 2 Cook, Corp. Sec. 624; 1 Thom., Corp., Sec. 802; and cases there cited. *In re Griffing Iron Co.*, 63 N. J. L. 168, 357. If the corporation or its members could bind itself by contract to retain the plaintiff in office whether

he was unable or unwilling to perform its duties or not, it would tend to defeat the very purposes for which the corporation was formed. But it has not attempted to do that. It has at most agreed to retain him under certain conditions in a certain office—which carries by implication the obligation on his part to properly perform the duties of that office and the liability to removal when he ceases to do so. There is much in the books upon the questions of the manner and causes of removal of officers and employees by corporations or their directors and the appropriate remedy—whether by action for damages, suit for specific performance, mandamus, *quo warranto*, injunction or otherwise, in case of unlawful removal and many distinctions are drawn. How far a court of equity should interfere in a case of this kind by injunction is perhaps not altogether clear. In *Imperial Hydropathic Hotel Co. v. Hampton*, L. R. 23 Ch. D. 1, the corporation attempted to remove two directors and elect two new directors in their places. An injunction was asked, not by the old directors to prevent such action, but by the corporation to prevent the removed directors from acting as directors. It was held that the power to remove directors was not inherent, that the contract between the members fixing the terms of the directors could not be varied, that in order to remove the directors the corporation would have to first exercise its reserved power to alter the articles of association, and that, as it had not done that, the attempt to remove the directors was futile and the injunction was refused. In *Eley v. Positive Assurance Co.*, L. R. 1 Ex. D. 20, it was provided in the articles that a certain person should be solicitor for the company, removable only for misconduct. He brought an action for damages for breach of contract after the company ceased to employ him. It was held that there was no contract with the corporation, inasmuch as, for one reason, the solicitor was not an original party to the articles, though apparently he acquired stock afterwards, but the improvidence of a contract by which the corporation would be tied to a person for his life was commented upon, even when it expressly provided for a removal for misconduct, and yet the court was hardly prepared to say

that it would be *ultra vires*. In *Browne v. La Trinidad*, L. R. 37 Ch. D. 1, the plaintiff had entered into an agreement with one acting as trustee for a company to be formed, by which the plaintiff was to convey certain property to the company for shares in the company and was to be a director for a little over four years at least. He did not subscribe to the memorandum of association. The agreement was adopted by the articles and the plaintiff was made a director. Afterwards a meeting was called to remove him before the expiration of the time specified in the agreement. He asked for an injunction to prevent his removal. The articles expressly provided for the removal of any director by special resolution before the expiration of his term. It was queried on the one hand whether in view of the contract, if there was one, an injunction ought not to issue, notwithstanding the provision for removal in the articles, and on the other hand whether the court ought to interfere by injunction to specifically enforce an agreement that the plaintiff should be an irremovable director, but it was held that there was no contract between the company and the plaintiff because he was not a party to the articles. In *Bainbridge v. Smith*, L. R. 41 Ch. D. 462, the owners of certain property conveyed it to a trustee for a corporation to be formed, one of the terms being that the plaintiff's father and, in case of his death or retirement, the plaintiff, should be managing director for ten years. This contract was adopted in the articles. Afterwards, the father having died, an attempt was made by the other directors to exclude the plaintiff as a managing director, and the latter asked for an injunction to prevent such exclusion. The main question in the lower court was whether the plaintiff had a required qualification of holding a certain amount of stock in his own right, and, that having been found in his favor, an injunction was granted against the remaining directors, who, of course, had no power to remove one of the directors, but the appellate court suspended judgment so as to give the stockholders an opportunity to indicate by vote at a meeting called for the purpose whether they desired the plaintiff to act as a managing director in case he were qualified, and, upon their passing a resolution that they

did not, the injunction was dissolved. There does not appear to have been any provision in the articles permitting the removal of any managing director except for disqualification or for cause. The court apparently based its action in not granting an injunction, on the ground that "it would be contrary to the principles on which this court acts to grant specific performance of this contract by compelling this company to take this gentleman as managing director, although he was qualified so to act, when they do not desire him to act as such."

Thus, assuming that the contract between the plaintiff and the corporation or the plaintiff and the other members, contained in the articles, is valid as far as it goes, we must hold at least that the plaintiff is subject to removal, and that, too, without liability on the part of the corporation to damages for breach of contract, in case he proves unwilling or unable to perform the duties of his office as required on his part by the contract itself, and that equity should not compel the corporation by injunction to retain in office one who will not or cannot perform its duties. To do otherwise would be not only to permit but to compel the corporation to disable itself from fulfilling the purposes for which it was created, to enforce a contract against one party and allow it to be violated by the other and to aid one who comes into equity with unclean hands. How far equity should interfere to see that the corporation, if it should attempt to remove the plaintiff from his office, acts in a legal manner, how far it should go in interfering with the findings of fact or final decision of the stockholders in case they should act in a lawful manner or how far it should go in saying to what extent the terms of the original trust deed may be considered as incorporated in the articles or how far they are binding on the corporation in so far as they are or are not incorporated in the articles, are questions that it seems premature to decide at present. The by-laws have been adopted. No injunction is asked against their adoption. No objection is made to the provisions of many of them. Some at least to which objections are made as to the plaintiff are not objected to as to others. All seem reasonable except in so far as they may interfere with vested rights. The

corporation has not attempted to enforce any of them against the plaintiff. It is not clear that it will. If it shall attempt to remove the plaintiff, it is not clear on what grounds it will attempt to do so, or how far it will rely on the by-laws in making such attempt. There are many nice questions of law involved as to the construction of the articles and by-laws, many of which have not been argued, in addition to the many possible variations in conditions of fact. The plaintiff practically asks the court to go through the articles and by-laws and construe them with reference to various hypothetical states of fact and declare how far he and the corporation may go under them in various directions. It will be time to decide specific questions when they arise. Equity should not attempt to delineate the paths which the plaintiff and the corporation may take or the limits to which they may go or attempt to control them by injunction at this stage,—especially considering how reluctant equity is to interfere with the management of corporations or even to grant injunctions at all except in clear cases or to specifically enforce hard contracts.

The decree appealed from is reversed and the case remanded to the Circuit Judge with directions to dismiss the bill and for any other proceedings not inconsistent with this opinion.

Hatch & Silliman, J. A. Magoon and T. I. Dillon for plaintiff.

Robertson & Wilder for defendants other than the Guardian *ad litem*.

A. S. Hartwell for Guardian *ad litem*.

FRANK GODFREY as Trustee for Thomas Metcalf v. JOHN KIDWELL.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MAY 11, 1903.

DECIDED DECEMBER 15, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A deed of all the grantor's right, title and interest in certain land, even if executed under the mistaken belief, shared in by both parties, that the grantor's interest would in all probability prove to be not more than one half, will not be set aside in a court of equity on the ground of mistake, if both parties, in executing and receiving the deed, knowingly speculated as to what such interest was.

OPINION OF THE COURT BY PERRY, J.

Thomas Metcalf, the complainant's *cestui que trust*, who became of age on January 13, 1901, executed to the respondent on April 4, 1899, for the consideration of \$100 a deed of all of his right, title and interest in the land of Waialele, Manoa, Oahu, containing an area of 36.10 acres, and on February 4, 1901, for the consideration of \$3000 a second deed relating to the same property. In the second deed, the language used is, in part, that "I, Thomas Metcalf, * * * the grantor named in a certain deed dated the 4th day of April, A. D. 1899, and recorded in the Register Office, in Liber 194, on pages 29 and 30, being now of legal age, * * * do hereby confirm said deed and do convey, remise, release and forever quitclaim unto the said John Kidwell and to his heirs," all of the land of Waialele just mentioned. The prayer of the bill in this case is for a decree

declaring that the two deeds were intended and understood by both parties to convey and did convey no other or greater interest than an undivided one half of the land described, that the deeds be cancelled and that the respondent be ordered to reconvey the land to complainant upon the return to him of the sum of \$3100 and interest.

The main averments set forth in the bill as grounds for the relief asked are as follows: that Theophilus Metcalf, grandfather of Thomas Metcalf, devised the property in question to his son Frank for life, providing further "that if my said son shall decease leaving children lawfully begotten the property by this instrument to him bequeathed, shall descend to such heirs, but if he shall decease not leaving lawfully begotten children, as aforesaid," then to others; that Frank Metcalf died March 9, 1900, leaving him surviving Thomas, a lawfully begotten child, and a daughter Emma Metcalf Ikaika; that at the time of the execution of each of the deeds above referred to, it was represented to Thomas by his father and by respondent that Emma and Thomas were the lawfully begotten children of Frank, and that the interest of Thomas conveyed by the deed of April 4, 1899, consisted of an undivided one-half; that in February, 1901, while Thomas' attorney was absent from the Territory, the respondent's attorneys offered him, Thomas, \$3000 for his one-half interest and that, being weak of mind, unaware that the true value of his half interest was more than \$7000, and totally ignorant of the value of land in these islands, he accepted the offer and executed the second deed; that it was represented to Thomas by respondent's attorneys that the interest to be conveyed by the second deed was an undivided one-half; that such attorneys and Thomas all supposed at the time that an undivided one-half was all the interest that Thomas owned and that the attorneys represented to Thomas that Emma owned the other one-half interest; that the respondent at the time understood that the interest conveyed was an undivided one-half; that on March 8, 1899, respondent purchased of Emma all of the right, title and interest in the property; that in June, 1902, the Supreme Court of Hawaii decided that Emma

was not the lawfully begotten child of Frank and that after that decision the respondent for the first time claimed and now claims that by the two deeds in question Thomas conveyed the whole of the land and not one-half only; that the whole land is, as Thomas has ascertained since the making of the deeds, of the value of \$14,000.

The Circuit Judge found that the deeds had been executed through a mistake, shared in by both parties, as to what Thomas' interest was, and that at the time the grantor intended to convey and the grantee to acquire thereby an undivided one-half interest only, and decreed a reconveyance of the other one-half. It is from that decree that the present appeal was taken.

The evidence does not show that the parties to the deed or either of them understood that the interest conveyed was not to be in any event greater than an undivided one-half or intended to limit the operation of the deed to that extent. On the contrary it does show that both parties understood that *all* of the grantor's interest, whatever it might be, without limitation,—large or small—was being sold and purchased and was to pass by the deed, and this, too, although both parties doubtless supposed that in all probability the grantor's interest would prove to be not more than one-half. The parties speculated. Now that the interest in question has proven to be or seems to be the whole, equity cannot grant the grantor relief. See 2 Pom. Eq. Jur. Sec. 855.

The deed of April 4, 1899, was clearly speculative. It purported to convey all of the grantor's right, title and interest. It was executed during the lifetime of Frank Metcalf, the life-tenant, and while there was yet a possibility that Emma Ikaika, the grantor's sister, might de cease before Frank Metcalf and that Frank might die before Thomas,—in other words while there was yet a possibility that the whole estate might pass to Thomas under his grandfather's will and to the respondent under the deed. Under his own testimony, Thomas fully realized this. The second deed was intended to be confirmatory of the first. The evidence and the bill of complaint show this and so does the deed itself upon its face; and in the evidence can be

found no reason for believing that the second deed was intended to be more limited in its operation than the first. At the time of its execution there were rumors of many claims adverse to Thomas, some in whole and some in part, and a good prospect of much litigation. The respondent's policy was to buy up all the claims or interests possible. He purchased those of Emma and Thomas and attempted, without success evidently, to purchase two others, those of Mrs. Rowland and of one Prosser. The respondent and his attorneys thought, perhaps, that Thomas' interest would prove to be more than one-half but they were not certain about the matter,—it might prove to be much less than one half—and had necessarily to take some chances while so much litigation was impending. Thomas himself, while he thought that his interest was one-half, did not know just what it was; he so testifies. Neither the respondent nor either of his attorneys made any representations to Thomas as to what his interest was, but, on the other hand, Mr. Robertson and Mr. Wilder, each in turn, told Thomas before execution (the deed was read to Thomas and was by him read three or four times and on separate days before execution) that the deed was so drawn as to convey *all* of Thomas' interest, *whatever it might be*. (Mr. Robertson's explanation was made immediately after a statement by Thomas to the effect that he thought that his interest was one-half). The testimony of each of the attorneys is positive, direct and clear on this point and we believe it to be true. Thomas said that was satisfactory and signed the deed. The deed, too, on its face purports to convey all of Thomas' interest whatever it may be. In the face of these facts and more particularly of the attorneys' statements to him concerning the effect of the deed, can it now be held that although he signed a deed conveying *all* of his interest "*whatever it may be*," Thomas nevertheless at the time understood that that meant "up to but not exceeding one half?" We think not. He expressed no such understanding at the time, but assented to the form as explained. The attorneys' explanations of the deed were couched in plain English and we believe that he understood them.

That deeds are not to be lightly set aside, there can be no doubt. In order to justify a court in rescinding or reforming such a written instrument, the mistake or other ground relied upon by the petitioner must be established by evidence which is clear and convincing. The evidence in this case not only fails to comply with this rule but clearly shows that there was no mistake such as is contended for.

There is nothing in the evidence to warrant a finding of actual fraud. The parties were not in any relation of trust or confidence but dealt at arm's length. The grantor was cautioned before entering upon the negotiations leading to the execution of the second deed that he was at liberty to repudiate the first and that he was not under any obligation to confirm it.

The decree appealed from is reversed and the cause remanded to the Circuit Judge for the entry of a decree dismissing the bill and for such further proceedings as may be necessary.

Thomas Fitch for complainant.

Robertson & Wilder for respondent.

CONCURRING OPINION OF FREAR, C.J.

I concur in the foregoing conclusion. There is no doubt that courts of equity go very far in relieving from mistakes—some courts relieving from pure mistakes of law, some of them distinguishing between mistake and ignorance of law (see Fry, Spec. Per., 3rd ed., Sec. 765 and note, and most courts relieve from mistakes as to private rights, which, although often arising solely from mistakes of law, are of a mixed character and are regarded practically as in the nature of mistakes of fact. In the present case, the alleged mistake relied on may, perhaps, be regarded as of the last mentioned kind; and the fact that the plaintiff had only just arrived at the age of majority when he executed the deed from which he asks relief, coupled with the fact that the defendant will receive a very large value in comparison with the consideration he paid, if the transaction is allowed to stand, naturally appeals to a court of equity. But the circumstances must be considered as they appeared at the time,

and not as they turned out afterwards, and if the parties really intended to take their chances and to make a speculative contract equity cannot relieve. As said in Pom., Contr., Sec. 239: "where parties have knowingly entered into a speculative contract, that is, one in which they intentionally speculated as to the result; and the facts upon which such agreement was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of defeating or rescinding the contract; in such classes of agreements the parties are supposed to calculate the chances, and they certainly assume the risks."

The mere fact that the deed in form purports to convey all the interests of the grantor would not of itself prevent relief, even though both parties understood precisely what the language was and its legal effect, if they in fact contracted on the basis of a particular interest mistakenly believed by both parties, or by one in consequence of inequitable conduct of the other, to be the interest actually conveyed. 2 Pom. Eq., Sec. 849. But was such the case here? There is not a particle of doubt that the contract was speculative up to a one-half interest at least. Both parties recognized that it might prove to be less. If it did so prove, the grantee of course would not be entitled to relief on the theory that both thought that the interest would prove to be one-half. Theoretically there is no reason why the contract could not be speculative up to a one-half interest, and made by mistake to cover the whole or more than one-half, so as to justify relief as to all actually conveyed above one-half through mutual mistake. There is also much reason to believe that both parties in this instance believed at the time that the interest of the grantor would not turn out to be more than a one-half interest. But did not they take their chances as to all over as well as to all under one-half? On all the evidence I am inclined to think they did, and the burden was on the plaintiff to show not merely that they may not have done this, but clearly that they did not.

Pom., Contr., Sec. 238. The question is not so much what each thought within himself, as what their mutual understanding was; not so much what each calculated in reasoning upon the probable result, as what it was with reference to which they contracted. They did not discuss the extent of the vendor's interest. The vendor, indeed, remarked at one point in the negotiations that he thought his interest was one-half but that he did not know, but he was told that the deed was drawn so as to convey all his interest whatever it was. It is true, parties may contract with reference to a subject matter as affected by some uncertainties and act through mistake in respect to other particulars, so as to present a case for relief, but that was not the case here. They contracted with reference to all uncertainties as to the extent of the vendor's interest, and in such case it is immaterial whether they had in mind each uncertainty specifically or not. They said nothing as to uncertainties which might reduce the supposed interest to less than a one-half interest as well as nothing as to those that might increase it to more than that amount. The facts were equally known to both parties, so far as appears, and both contracted with reference to the uncertainties, whatever they were, as to the extent of the grantor's interest, recognizing that there were uncertainties though perhaps not knowing particularly all of them. There is no satisfactory evidence as to what elements each actually took into consideration in estimating the probable result,—assuming that their unexpressed thoughts could affect the result in law. In most cases of this kind in which relief is given, the mistake clearly appears from the language used or from external facts, as where there is an attempted purchase through mistake of what the vendee already owns or of what is non-existent or what turns out to be a different subject, &c. See Pollock, Contr., 418 *et seq.*

DISSENTING OPINION OF GALBRAITH, J.

I cannot concur in the conclusion announced above by the majority of the court.

The Circuit Judge found that while the consideration of three thousand dollars recited in the second deed was less than

the value of one-half the land conveyed still it was not so grossly inadequate as to justify the court in setting aside the deeds on that ground; that the deed was executed under a mutual mistake of fact; that each of the parties believed at the time that Thomas Mecalf owned only a one-half interest in the land and that that was all he intended to convey and all that John Kidwell expected that the deed did convey to him.

To my mind these findings are fully supported by the evidence and the decree of the Circuit Judge should be affirmed.

The general doctrine is that a court of equity will grant its affirmative or defensive relief, as the circumstances may require, from the consequences of any material mistake of fact but will not relieve against a mistake of law and that a mistake relative to one's private legal rights or interest is treated as a mistake of fact. Pomeroy's Eq. Jur. Sections 842, 843, 849, 852; Maupin on Marketable Title to Real Estate, Sections 343, 244; 20 Am. & Eng. Ency. of law, 2nd Ed. 818, 819; *Wilson v. Western N. C. Land Co.*, 77 N. C. 445, 452; *Gillispie v. Moon*, 2 Johns Ch. 585; *Fly v. Brooks*, 45 Ind. 50; *Baker v. Massey*, 50 Iowa 399; *Haviland v. Willets*, 141 N. Y. 35; *Cooper v. Phibbs*, L. R. 2 H. L., 149, 190.

The facts of this case bring it clearly within the rule as given by Pomeroy in Section 849, above cited, as follows: "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property, or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

Did the parties speculate in this transaction? The first deed, that executed during the minority of Thomas Metcalf, may have been speculative. There were several contingencies that possibly were before the minds of the parties that might happen and change the interest of the grantor in the premises attempted to

be conveyed. There certainly was a chance whether Thomas would ratify the deed on reaching his majority. It will be observed that the defendant did not place a high valuation on this deed since he only paid one hundred dollars for it. But the second deed stands upon an entirely different footing. At the time of its execution there was a definite understanding as to the interest the grantor claimed in the land. The consideration paid for this deed was three thousand dollars. This last fact alone proves to my mind that the defendant was satisfied that the grantor's claim to one-half interest in the land was well founded.

It is found in the opinion of the court that the elements of chance, the speculative features that entered into the contract, were the rumors of "many claims adverse to Thomas" and "a good prospect of much litigation," that both of the parties took into consideration the chances that some of these various claimants might establish a claim to an interest in the premises and thus reduce the grantor's interest to less than one-half. All this might be admitted without agreeing to the conclusion announced. It does not appear that any of these rumored claims ever materialized in a suit or in the establishment of any recognized interest in the land. The subsequent event that did change the status of the interest of the grantor in the land, the event that was not considered or anticipated at the time of the execution of the deed, was the decision of this court filed in June, 1902, holding that Emma Metcalf was not "lawfully begotten" and had no interest in the land. This decision left Thomas Metcalf with the whole of the land and not one-half of it as both parties understood it to be at the time of the execution of the second deed. This decision was rendered more than one year subsequent to the date of the deed. Such a decision or construction of the will was not anticipated by either party when the deed was executed. It was not mentioned or thought of, was not considered doubtful or contingent, nor did the parties deal in reference to it. The attitude of the defendant in litigation then pending and his purchase of Emma's supposed interest in the land for a valuable consideration prior to this decision

proves conclusively that he did not anticipate the decision or speculate on its bearing on his deed and the interest conveyed thereby. He should not be permitted to take advantage of the decision to the great detriment of his grantor.

Under the law governing speculative contracts the rule is well settled that the element of chance, or the thing or event that is uncertain, must be known to the parties at the time of entering into the contract and the parties are considered to have calculated the chances of the uncertain event happening or not, and to have contracted in relation to it.

The rule is stated as follows: "It is also necessary that the uncertainty in respect of which the contract is made, should be understood and intended by both parties as attaching to the very same event or act which, being then unknown but anticipated, afterwards happens. If, therefore, the parties contract with reference to a certain contingent or doubtful event, and some other unknown fact, to which the parties had not referred, and in respect of which they had not contracted subsequently arises, materially altering their relations, and rendering an execution of their agreement inequitable, its enforcement may, under such circumstances, be denied." Pomeroy, Contracts, Sec. 178, p. 229. See also *Williard v. Taylor*, 8 Wall 557.

Again the deed is unfair and unjust and ought to be reformed on this ground alone. The finding of the Circuit Judge that the three thousand dollars is not a fair consideration for one-half of the land is supported by the evidence. The lowest valuation placed on it by any of the witnesses at the hearing was ten thousand dollars. I am not willing, under the circumstances of this case, to confirm title in the defendant to an entire tract of land worth at least ten thousand dollars, and for which he only paid three thousand one hundred dollars, when both the grantor and grantee at the time of the execution of the deed intended that it should convey one-half only.

Again the method pursued by the defendant in obtaining these deeds does not appeal to my sense of justice and right. First we find him taking a deed from a minor for property worth many thousand dollars for a paltry consideration of one hun-

dred dollars. Then as soon as the minor arrives at legal majority the defendant hires two lawyers and the three of them set after the young man with the purpose of inducing him to execute a confirmatory deed conveying his inheritance to the defendant. The defendant knew that the young man was without business training or experience and that he could not resist the temptation to accept an offer of a large sum of money for his inheritance whether it was a fair consideration for it or not. Still it seems not to have occurred to the defendant to suggest to Thomas Metcalf that he consult independent advice or some disinterested friend before closing the deal. Nor did these conditions seem to deter the defendant even from "driving a hard bargain" for the one-half interest which the grantor was then understood to own. Such a transaction has few of the elements of a "deal at arm's length" and ought not to be so classed.

I am convinced that the ends of justice would be subserved by granting affirmative relief against this most inequitable transaction, at least, to the extent of affirming the decree rendered by the Circuit Judge.

IN RE ROBERT N. BOYD.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED DECEMBER 5, 1903. DECIDED DECEMBER 18, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

If the elimination of a portion of an Act as void, would make the remainder, if allowed to stand, mean something different from what the Legislature intended by that remainder, the latter cannot stand.

The provision in Section 52 of the Organic Act that appropriations shall be made biennially, does not prevent the Legislature from dividing the biennial period into two parts, namely, six months before and eighteen months after the inauguration of county government, for the purpose of making different appropriations for each of those parts.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from the decision of the Auditor refusing to issue a warrant or warrants for the payment of the appellant's salary as Deputy Registrar of the Court of Land Registration from July 20 to September 30, 1903, out of the appropriation for "Expenses under Land Registration Act, \$22,500.-00," for the eighteen months beginning January 1, 1904.

The legislature of Hawaii, which formerly sat annually, has for more than forty years held its regular sessions biennially, and of course made appropriations for biennial periods. The date of commencement of the fiscal period has been changed from time to time, but for some years prior to 1901 it began on the first of January in the even years, in which the legislature sat. In 1901 the first legislature after the establishment of the Territorial Government in 1900, changed the fiscal period so as to have it begin on the first of July in the odd years, in which the legislature was to hold its regular sessions thereafter.

In 1903, an act was passed providing for the establishment of county governments to begin in January, 1904, and providing for the transfer to the counties of many items of revenue and expense which formerly belonged to the central government. Accordingly, the legislature, in passing the usual appropriation bills for salaries and expenses respectively, divided the biennial period into two parts, namely, the six months prior to the inauguration of county government and the eighteen months thereafter. Thus there are the so-called "six months" salary and expense bills respectively, covering the last half of the year 1903, and the "eighteen months" salary and expense bills respectively, covering 1904 and the first half of 1905.

The same legislature provided for a Court of Land Registration to begin the first of July, 1903. The six months and the eighteen months salary bills provide for the payment of the salaries of the judge, the registrar, civil engineer, two clerks and stenographer of that court, but not for the salary of a deputy registrar. The appellant was appointed to the last named office with the understanding that he would be paid out of the appropriation for the expenses of the court, but, although the eighteen months expense bill provides for such expenses for the eighteen months beginning January 1, 1904, the six months expense bill makes no provision for such expenses for the preceding six months.

The land registration Act seems to assume (Laws of 1903, Act 56, Sec. 7) that there might be a deputy registrar, and provides (Sec. 13) that the salaries of the assistant registrars, examiners of titles and other assistants and messengers (without mentioning the deputy registrar specifically) may be fixed by the Governor, and the Governor has fixed the salary of the deputy registrar at \$1500 a year. We will assume that this deputy is properly in office and that his salary may be paid out of an appropriation for expenses of the court, provided there is such an appropriation available.

The appellant's contention is that the legislature could not under the provisions of the Organic Act divide the biennial fiscal period into two parts, that so much of the eighteen months bill (Laws of 1903, p. 422) as purports to limit the appropriation for the expenses of the Land Registration Court to the last eighteen months of the biennial period is void, and that that appropriation therefore became available as soon as the biennial period began.

If the limitation of the Act to the eighteen months period should be held void, it would not follow that the appropriation would be available for the six months period. The appellant's own argument, if sound, might require us to hold the whole Act void, for there would then be no limitation at all—not even to the biennial period for which alone he contends that the appropriation could properly be made. But, however that may

be, and although it is true that one portion of an act may be held void and the remainder allowed to stand, it does not follow that the remainder may stand, if the elimination of the part would make such remainder mean something different from what the Legislature intended. It is one thing to allow a part to remain as the Legislature intended it, and quite another to alter that by making it cover more than was intended. The court cannot legislate. The result is not always the same when an exception or a limitation or a condition is held void as when some other portion is so held. Here the Legislature made the appropriation for one period. The court cannot make it apply to a different period. The result would be, if the argument were sound, that the whole Act would be thrown out and the appellant would be no better off than if it were all allowed to stand. On this point see *Robertson v. Pratt*, 13 Haw. 590, 594; Sutherland Stat. Constr., Secs. 179, 180.

But, in our opinion, the appellant's argument is not sound. The appropriation is made under Section 54 of the Organic Act, which provides for an extra session of the legislature "for the consideration of appropriation bills," in case of a failure to pass appropriation bills for necessary current expenses, etc., at the regular session. Section 52, which relates to appropriation bills of regular sessions, provides, among other things, "that appropriations, except as otherwise herein provided, shall be made biennially by the legislature," and Section 53 provides for submissions by the Governor of estimates for the succeeding "biennial" period. Assuming that Section 54 is subject to whatever restrictions are implied in the word "biennially" used in Section 52, we are of the opinion that the appellant's contention that the Legislature could not limit certain appropriations to one portion, and other appropriations to another portion of the biennial period, cannot be sustained. Just what the full force of the word "biennially" is as used here we need not attempt to say. It is clear that the word was not inserted, for the purpose, as contended, of preventing the Legislature from hampering the Executive by distributing the expenditures through the period. The main object of Sections 52, 53 and 54

is apparent—especially when considered in the light of Sections 1, 2 and 4 of Article 70 of the Constitution of 1894, from which they were adapted, and of the circumstances under which each of these sets of provisions was enacted. How these provisions should be applied specifically under varying circumstances, we need not say. But, that the Legislature may properly divide the biennial period as it has divided it in view of the inauguration of county government in that period, seems clear. Why the Legislature did not provide for the expenses of the Land Registration Court for the first six months does not appear—whether through oversight, or because it thought there would be little or no business in that court during that period, which seems to have been the case, or for some other reason.

The appeal is dismissed.

Attorney General L. Andrews and P. L. Weaver for appellant.

Smith & Lewis and L. J. Warren for the Auditor.

TERRITORY OF HAWAII *v.* SUPERVISORS OF THE COUNTY OF OAHU.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 30, 1903. DECIDED JANUARY 13, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

When the valid and invalid parts of an act are so mutually connected with or dependent on each other as to warrant a belief that the Legislature intended them as a whole and that, if the invalid parts could not be carried into effect, the Legislature would not pass the valid parts independently, the whole must fall.

So much of Act 31, Laws of 1903, known as the County Act, as provides new features in Territorial taxation not incidental to county organization or government, is void under the provision of Section 45 of the Organic Act, "that each law shall embrace but one subject, which shall be expressed in its title."

Said void portion is such an essential feature as to vitiate the whole Act.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from a decree dismissing a petition for a writ of *quo warranto* brought by the Territory for the purpose of inquiring by what authority seven named respondents claim to hold office as Supervisors of the County of Oahu. The real object of the proceeding is to test the validity of Act 31 of the Laws of 1903, known as the County Act, most of the provisions of which were to take effect by its terms on January 4, 1904.

If the Act is void, the respondents do not lawfully hold the offices which they claim to hold solely under that Act.

No question has been raised by the respondents as to procedure or jurisdiction, but on the contrary they seem equally desirous with the petitioner to have the case decided on the merits.

The arguments against the validity of the Act are in general as follows:

1. That the Act was never passed by the House of Representatives as required by the provision in Section 46 of the Organic Act, that in order to become a law the final passage of a bill in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes and entered on the journal, in that, as contended, the House journal shows that the final action in that body was the adoption of the report of the conference committee which recommended certain amendments and does not show that the bill as so amended was passed at all by the House.

2. That the Act makes the County Board of Supervisors an elective body, contrary to the provision in Section 80 of the Organic Act, that the Governor shall appoint, with the advice

and consent of the Senate, certain specified officers and boards and "any other boards of a public character that may be created by law."

3. That the Act creates a Territorial Board of Equalization consisting of the Secretary, Treasurer and Auditor of the Territory, not appointed by the Governor, with the consent of the Senate, at all as to one of its members, the Secretary, nor appointed by him as members of the board as to any of its members, contrary to said Section 80 of the Organic Act.

4. That the Act requires the transfer to the counties, to be controlled by various elected county officials, of much public property that was ceded by the Republic of Hawaii to the United States by the Joint Resolution of Annexation and was by Section 91 of the Organic Act placed by the United States in the possession of the Territory of Hawaii, to be controlled, as contended, by various appointive Territorial officials, "until otherwise provided for by Congress or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii."

5. That the Act practically abolishes the offices of Superintendent of Public Works and High Sheriff by transferring most of their powers and duties to other officers, contrary to Section 75 of the Organic Act, which provides "that there shall be a Superintendent of Public Works, who shall have" certain enumerated powers and duties, and Section 79 which contains a similar provision in regard to the High Sheriff.

6. That the whole Act is void because it contains two subjects, one in relation to county government and one in relation to Territorial works and institutions and because, as contended, the title of the Act is likewise correspondingly double, in contravention of Section 45 of the Organic Act, which provides "that each law shall embrace but one subject which shall be expressed in its title."

7. That so many and such important portions of the Act are void and ineffective that none of it can stand.

We will assume for the purposes of this case that the first six

of these arguments are unsound, and base our decision on the seventh alone.

In support of this argument a number of provisions in the Act were pointed out by counsel as being, according to their contention, void or ineffective in whole or in part for one reason or another. Without professing on the one hand to enumerate fully or on the other to confine ourselves strictly to the provisions instanced by counsel or the reasons advanced by them in each instance, the general line of thought on this branch of the case may be illustrated by the following statement of arguments: that certain provisions are void or ineffective in whole or in part because they are made to depend upon laws which were assumed to be still in force but which had in fact been repealed (as, for instance, Sections 454, 455, relating to contested elections, as shown by *In re Election Contest*, ante 323); or because they purport to transfer to certain county or Territorial officers powers and duties which were assumed to have been in certain other officers, whose offices, however, had been abolished by the Organic Act or whose duties had been transferred either by the Organic Act or by our own laws to other officers (as, for instance, Sections 365, 394, which purport to transfer to other officers the powers and duties of the Minister of the Interior relating to medicine, surgery, pharmacy, dentistry and prisons); or because they relate to purely Territorial matters in contravention of the provision of the Organic Act that each law shall embrace but one subject which shall be expressed in its title, (as, for instance, Sections 380-391, 483-487, 494, relating to the Territorial Board of Public Institutions, as shown in *Dole v. Cooper*, ante 297); or because of two or more of the foregoing reasons (as, for instance, Sections 395-401, 495, 496-501, which place the Territorial penitentiary in the control of the Territorial Board of Public Institutions and provide for a transfer of powers and duties from the Minister of the Interior—not to go into the question whether the subject of a Territorial penitentiary itself could properly be included in the Act or how far the matters of prisons, criminal procedure, sentences, etc., in general might be affected by the failure of the provisions in question);

or because they purport to alter laws that cannot be altered at all by the Territorial Legislature, the power to alter which is reserved exclusively to Congress by the Organic Act (as, for instance, Sections 171-172, 450-451. relating to the settlement of boundaries and the returns, canvass and certificates of election in the case of Territorial Senators and Representatives—not to consider whether the latter subject could properly be included in a county act at all); or because they violate provisions of the Organic Act or other Acts of Congress relating to the Territories prohibiting special legislation in regard to counties, as, for instance, the proviso of Section 1 relating to the County of Kalawao, and Section 14 relating to the Supervisors of the County of Oahu.

But we will assume for the purposes of this case either that all such provisions are valid and effective, except so far as held otherwise in the cases above mentioned, or else that, if invalid or ineffective, they may, important though some of them are, all fall without causing the Act as a whole to fall.

There is, however, one subject that, in our opinion, is improperly included in the Act, without the provisions in regard to which it cannot be presumed that the Legislature would have passed the rest of the Act. That is the subject of Territorial taxation—the very means upon which the Territorial government depends for its life. We will assume that the Territorial Board of Equalization might properly be constituted as it is in terms by this Act, notwithstanding the provisions of Section 80 of the Organic Act. Still the subject of Territorial taxation is one that, like the subject of the Territorial Board of Public Institutions, cannot be included in the Act, in view of the provisions of Section 45 of the Organic Act relating to titles of laws.

The Act makes radical changes in the system of Territorial taxation. It may almost be said to provide a new system. Among other things, it provides for the equalization of valuations of real property among the several counties, as far as regards the Territorial tax, by a purely Territorial Board. This board also is required to determine the rate of the Territorial tax upon both real and personal property, and in case of its

failure to do so, the rate is fixed at five mills on the dollar. Sections 186, 221, 222.

The Act is entitled "An Act Providing for the Organization and Government of Counties and Districts, and the Management and Control of Public Works and Public Institutions therein." An act relating to taxation could cover both Territorial and county taxation. Whether an act relating to Territorial government could properly cover county government, or an act relating to Territorial taxation could properly cover county taxation might be a question—although under an act which according to its title related to state and county revenues, but which contained a section on municipal revenues, the Supreme Court of Tennessee held not only that section but the entire act void. See *Bugher v. Prescott*, 23 Fed. 20. But an act relating to county taxation or county government could not cover Territorial taxation. No doubt a number of provisions in this Act could be sustained, not as parts of the Territorial system of taxation but as incidental to county government, although they relate more or less to what were previously parts of the Territorial system of taxation. An act relating to counties created in a fully organized Territory with a centralized government would naturally and probably necessarily contain some such provisions. Lines of demarkation and transfers would have to be made and this could be done by inclusion, exclusion, amendment or repeal so far as necessary for the purposes of providing for the organization and government of counties. But this Act goes much further than this. It provides for most important changes in the system of Territorial taxation, and that, too, with nothing in the title of the Act to indicate this.

What is the result? The provisions relating to county and territorial taxation, covering nearly a fourth of the entire Act, are interwoven, and were intended to be parts of a general scheme. If the part relating to county taxation would have to fall with the part relating to Territorial taxation, the counties themselves would be without the greater portion of their contemplated means of subsistence and the entire act would nec-

essarily fall. If the part relating to Territorial taxation could be separated from the part relating to county taxation, then, if the rest of the Act could stand, it would be only on the theory that, as to Territorial taxation, previously existing laws would remain in force. There would then be two systems of taxation, each complete in itself, with two sets of officers and other machinery from top or bottom, with double expenses, two returns, assessments, *etc.*, to be made in the case of each tax-payer, the possibility of two valuations by different assessors or boards and two appeals, *etc.*, in each instance, *etc.*, *etc.* The Territory would also have to collect most of the taxes as fixed by previous laws, sufficient perhaps to support the entire government as it was previously, notwithstanding that the greater part of the expenses were to be hereafter borne by the counties. The counties would also have to collect the rate which this Act purports to authorize. The people would then be taxed much more heavily than was contemplated or is necessary. In view of the extent to which the intention of the Legislature would be frustrated and inconvenience and hardship would result in case the rest of this Act were allowed to stand without the part relating to new features in Territorial taxation, it cannot be supposed that the Legislature would have passed the rest of the Act in its present shape. For the court to sustain the rest of the Act under the circumstances would be to assume legislative power.

We fully realize that, as we have held in the past, the organic provision relating to titles of laws should be liberally construed, and the court should sustain an act of the Legislature, if possible. But the superior law must control in a clear case of conflict. The court cannot, nor can a large majority any more than a small majority of the Legislature, override the organic law, however much any particular law or form of law may be desired.

In our opinion the Act in question is void, the respondents are not entitled to the offices which they claim, the decree appealed from is reversed and an appropriate decree in conformity with this opinion may be entered in this court.

J. A. Matthewman and C. R. Hemenway for the petitioner.

Kinney, McClanahan & Cooper and *S. H. Derby*, counsel in another case, argued on the same side, by permission.

A. S. Hartwell and *W. T. Rawlins* for the respondents.

IN THE MATTER OF THE ESTATE OF WILLIAM
BRASH, Deceased.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 2, 1903. DECIDED JANUARY 15, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An adjudication that a person is of unsound mind and unable to take care of her property and an appointment of a guardian of her person and property, are null and void, where no notice of the proceedings or opportunity to be heard is given to the supposed insane person.

OPINION OF THE COURT BY PERRY, J.

Under the title, "In the Matter of the Estate of William Brash, Deceased, Probate 152", Susan Brash, who is claimed by the appellant to be a person of unsound mind and of whose person and property the appellant claims to be guardian, on September 19, 1902, filed, before the Circuit Judge at Chambers, in Probate, an affidavit and petition in which she avers *inter alia*, "that said J. Alfred Magoon" (appellant) "was, as she is informed and believes, never legally appointed her guardian and that she does not wish him to act in that or in any other capacity for her" and prays, in part, that Mr. Magoon render a final account and deliver forthwith to her all personal property to which she is entitled under the will of her father. The Circuit Judge rendered a decree declaring that a legal guardianship

over the person and estate of the petitioner has never existed and further declaring Mr. Magoon to be the trustee of the petitioner and ordering him as such trustee to render an account of his receipts and disbursements and to deliver to such person as the court might designate all property in his hands belonging to the petitioner. It is from this decree that the present appeal is taken by Mr. Magoon.

The facts, which are undisputed, are as follows: William Brash, father of Susan Brash, died in Honolulu on April 11, 1880, leaving a will. On April 13, 1880, a petition for proof of the will and for letters testamentary was filed and on the same day was issued an order of publication of notice of the time and place of the hearing of the petition for probate. Notice as so ordered was published in an English newspaper, designating May 5, 1880, as the time of the hearing. On the return day, a hearing was had. The clerk's minutes, under the title, "In the Matter of the Proof of the Will of William Brash; of Honolulu, deceased", read, in part, as follows: "Petition of William G. Brash, son and Executor, for probate of the Will of the above-named decedent and for the issuance of Letters Testamentary to him, the said William G. Brash. Order of Hearing made 13th April returnable this day.

"Present: R. F. Bickerton for Petitioner, Wm. G. Brash, Mrs. Elizabeth Brash Robson and Susan Brash.

"Mr. Bickerton reads the petition, Order of Hearing and files the affidavit of publication and calls" four witnesses who testified to the death of the testator and to the execution of the will. One of the witnesses, a son of the decedent, in giving his testimony said: "Susan Brash, who is in court, needs a guardian, having been an invalid since childhood." "The Court", the minutes continue, "admits the Will to probate and orders that Letters Testamentary and Letters of Guardianship of the estate of Susan Brash may issue to Wm. G. Brash, it appearing that the said Susan Brash is of unsound mind and it being suggested by the will and Letters of Guardianship of the person of said Susan Brash may issue to Mrs. Elizabeth Brash Robson." Letters were, presumably, issued as ordered.

On June 6, 1892, an order was signed by the Probate Judge, reciting that W. G. Brash as executor of the will of W. Brash, deceased, and guardian of the estate of Susan Brash had filed certain accounts and had applied for a discharge as such executor and guardian, allowing the accounts, granting the discharge as prayed for and ordering the retiring executor to deliver over all property in his hands "to J. Alfred Magoon, who is hereby appointed administrator with the will annexed of the estate of said W. Brash, deceased, and guardian of the property and person of said Susan Brash", and that "letters of administration with the will annexed of the estate of said W. Brash, deceased, and letters of guardianship of the estate and person of said Susan Brash be issued to him" upon the filing of a bond.

There can be no doubt that this last mentioned appointment of Mr. Magoon as guardian was merely by way of substitution and that no hearing was then had or adjudication made on the question of the soundness of Susan's mind. It was based upon the adjudication made in 1880 and is not valid unless the appointment of W. G. Brash as guardian was valid.

The main question is whether or not the adjudication made in 1880 that Susan was of unsound mind is valid, and, more specifically, whether the court acquired jurisdiction over the alleged insane person. In our opinion, the court did not acquire such jurisdiction. Our statute on the subject, Section 1963, C.L., reads: "When the relations or friends of any insane person shall apply to any of the Judges hereinbefore mentioned, to have a guardian appointed for him, the Judge shall cause notice to be given to the supposed insane person, of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed, and if after a full hearing, it shall appear to the Judge that the person in question is incapable of taking care of himself, the Judge shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified." It may be assumed for the purposes of this case, without so deciding, that the application referred to in that statute need not be in writing but may be oral and that the lack of a "full hearing" was a mere irregularity of procedure which cannot be

availed of at this late day. Still the fact remains that the requirement as to notice was not complied with. No notice at all was given the supposed insane person, nor any opportunity to be heard. Upon the mere suggestion of a witness, in a wholly distinct proceeding instituted for an entirely different purpose, that Susan had been "an invalid" since childhood and needed a guardian, without any evidence being taken and without any hearing being otherwise had, and without any delay or opportunity to have any showing made to the contrary, the adjudication and appointment were made. Under such circumstances the adjudication and appointment can not, we think, be regarded otherwise than as null and void. Nor can it be supported on the ground that Susan was present in the court room at the time the order was made and thereby submitted herself to the jurisdiction of the court. Mere presence in court does not constitute appearance as a party. *Smith v. Hamakua Mill Co.*, 13 Haw. 245, 248, 249. Susan's presence on that occasion was in response to the citation to parties in interest to appear in the matter of the petition for proof of the will of her father and her appearance, if any, as a party, was in that matter only. While she might be held bound by the proceedings had with reference to the will, she cannot be held to have entered an appearance or submitted to the jurisdiction in the guardianship matter, even assuming that she was mentally capable of waiving the requirement as to notice.

It is contended that this statutory requirement applies only in cases where an application is made by relatives or friends and not in a case where the judge of his own motion institutes an inquiry. Assuming that this is so and that, aside from the statute, the judge in probate would have inherent power to make such an appointment, still the fundamental principles of justice and of law would require that reasonable notice and an opportunity to be heard be given to the party whom it is proposed to deprive of rights of person and of property. Citations of authorities upon this point would seem to be unnecessary. See, however, *Eddy v. The People*, 15 Ill. 386, 387; *In re Abraham Whitenack*, 3 N. J. 252; *Jessup v. Jessup*, 7 Ind. App. 573,

579; *In re Wellman*, 45 Pac. (Kans.) 726, 727; *Smith v. Burlingame*, 4 Mason 121; *Allis v. Morton*, 4 Gray, 63, 64.

It is further contended that the defects, if any, as to notice and opportunity to be heard, have been waived and the adjudication and appointment ratified and confirmed by Susan's appearance at subsequent hearings upon annual accounts and other proceedings in the course of the alleged guardianship. Assuming that Susan has at times been present at such hearings, still, if she was of unsound mind as found by the probate judge and as it was necessary for him to find in order to have authority to appoint a guardian, she was incompetent to make any such waiver or ratification. See *Behrensmeyer v. Kreitz*, 135 Ill. 591, 638, and *North v. Jeslin*, 59 Mich. 624, 647. The appellant is not in a position to concede that she was not insane. On the contrary in his answer in the matter at bar he alleges that she is a person of weak mind and at times is entirely bereft of reason.

For other cases bearing upon the subject of notice in cases like that at bar, the objects of and reasons for notice upon one actually insane and the result of lack of notice, see *Coolidge v. Allen*, 82 Me. 23, 25; *Jessup v. Jessup*, 17 Ind. App. 177, 187; *Hathaway v. Clark*, 22 Mass. 490, 491; *Chase v. Hathaway*, 14 Mass. 221, 225; *Rust's Appeal*, 177 Pa. St. 340, 343; *Sears v. Terry*, 26 Conn. 273, 284; *Appeal of Royston*, 53 Wis. 612, 618.

While it may be that with the proceedings of courts of record all reasonable presumptions must, in the absence of any showing to the contrary, be indulged in in support of the jurisdiction, in this case a common sense reading of the record requires us to hold that the actual proceedings had were those only which are detailed above and that no notice of any proposed guardianship or opportunity to be heard was given the alleged insane person.

The ruling that the former order of guardianship and appointments of guardian are null and void is correct. No order to vacate these was made and the form of the affidavit or petition by Susan Brash, and more particularly of its prayer, leaves it at least doubtful whether such a decree of vacation can properly be made on the present pleadings. The declaration of a

trust in favor of Susan Brash and the order to her trustee to account were beyond the jurisdiction of the judge sitting in probate in the matter of the Estate of Wm. Brash and must for that reason be set aside. Whether the Circuit Judge may require Mr. Magoon to account in some other capacity in this proceeding we need not say for that question is not before us.

The decree appealed from is reversed and the cause remanded to the circuit judge for such further proceedings, consistent with this opinion, as may be necessary.

W. S. Fleming and *H. E. Highton* for Susan Brash.

J. A. Magoon in person.

IN THE MATTER OF GEORGE A. DAVIS, An Attorney
at Law.

PETITIONS FOR REOPENING AND HEARING.

SUBMITTED NOVEMBER 4, 1903. DECIDED JANUARY 19, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The rendering of a previous judgment held not to disqualify a judge, because such judgment was rendered in another case and upon a question not involved in the case in which the objection of disqualification is presented.

That a judge on three different occasions some years ago punished an attorney for contempt of court does not of itself show bias or prejudice on the part of such judge against the attorney.

Upon the facts stated in the opinion a judge of the court held not to be disqualified by reason of interest as alleged.

A rehearing will not be granted on the ground that the Chief Justice of this Court, not called at the trial, is a necessary and material witness, no intimation having been given at or before the trial that the proposed witness could give any testimony or as to what testimony, if any, he could give, if called, and no desire having been

expressed that he testify and no intimation being even now given as to what he could testify to; or, in a disbarment case, on the ground that the party supposed to be aggrieved by the misconduct of the attorney was not called by the Attorney General as a witness; or on the ground that a necessary and material witness was absent from the jurisdiction at the time of the trial, where no showing is made as to what his testimony would be, if called, and where, in submitting the case to the Court for decision, the party now asking for the rehearing expressly said that he would not call the witness but would close without his testimony.

In a disbarment case no complaint by the party supposed to be aggrieved is necessary. An information may in such case be filed by the Attorney-General.

Ratification, if any, by a client or other party most interested, of misconduct of an attorney, does not bind the Court or affect its duty in a proceeding for disbarment.

In a disbarment case, it is not a defense that at the time of the alleged misconduct the attorney was a District Magistrate.

This Court may in a proper case disbar an attorney whose license was originally granted by the Supreme Court of the Republic of Hawaii, and who since the Organic Act took effect has not received a new license from this Court or taken the oath prescribed by Section 19 of the Organic Act.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

These are petitions for a reopening and rehearing of the case. Nine grounds are alleged in the petition and supplemental petition, in substance as follows: (1) that respondent did not have time to properly prepare for his defense; (2) that necessary and material witnesses were absent from Honolulu at the time of the hearing; (3) that this court had no jurisdiction because there was no complaint by any of the parties interested; (4) that the statute was not complied with and that the filing of an information by the Attorney General was irregular; (5) that the acts and conduct complained of were ratified and confirmed by the parties interested; (6) that the Chief Justice was disqualified, by reason of interest and relationship within the meaning of the Organic Act, to take part in the hearing and

determination of the case and that therefore the order of disbarment is void; (7) that the findings made are not supported by the evidence; (8) that this court had no power to revoke the respondent's license to practice in the District Court of Honolulu because at the time the order was made the respondent was a magistrate of that court; (9) that the respondent was not at any time licensed to practice as an attorney, counselor or solicitor of this court or of any other court of this Territory and that therefore this court had no jurisdiction to make the order now sought to be reviewed.

In affidavits and briefs filed in support of the petitions five additional grounds, not mentioned in the petitions themselves, are referred to: (10) that prior to the filing of the information, the Attorney General had presented to this Court a report wherein he stated, in effect, that in his opinion there was no cause for preferring charges of misconduct against the respondent; (11) that the trial was not fair, because the writer of this opinion was at the time biased and prejudiced against the respondent and was for that reason and also for the reason that he had rendered a previous judgment concerning the sanity of Sumner disqualified; (12) that certain evidence tending to show what became of the sum of \$46025 after it was deposited in bank was erroneously excluded; (13) that Maria S. Davis did not testify; and (14) that a certain agreement executed September 30, 1902, and relating to fees and to the power of settlement and discontinuance, had been mislaid at the time of the trial and has since been found. These five grounds while strictly not properly before us will nevertheless be considered.

First in natural order are the suggestions of disqualification of members of this Court. That the writer had prior to these proceedings as Circuit Judge passed upon the question of J. K. Sumner's sanity did not disqualify him as matter of law for that previous judgment was not rendered in this case; nor is this an appeal or new trial in that case. The provision of the Organic Act is, Section 84, that "no judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment." The question of whether or not Sumner

was insane within the meaning of our statute on guardianship, was not even in issue in this case, nor was it passed upon. On the subject of bias and prejudice, the only fact stated in support of the contention is that on three different occasions some years ago the writer as Circuit Judge punished the respondent for contempt. It is not even alleged that the punishment was undeserved. The writer has no hesitation in saying that in fact no bias or prejudice exists or existed at the time of the trial and the Court finds that no cause has been shown for believing that any exists or existed.

The provision (Section 84) of the Organic Act with reference to which the suggestion that the Chief Justice is disqualified is made, is that "no person shall sit as a judge * * * * in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as plaintiff or defendant, or in the issue of which the said judge * * * * may have, either directly or through such relative, any pecuniary interest." The facts relied upon are that the Chief Justice is a stockholder in the Oahu Railway & Land Co. and a trustee for its bondholders and that he is related within the degree named to Mr. B. F. Dillingham, an officer of and a stockholder in that corporation. It appeared in evidence during the hearing, in connection with one of the charges against the respondent, that the latter obtained \$5000 from the Railroad Company in the course of the settlement of the litigation then pending. Neither the Chief Justice nor Mr. Dillingham nor the Oahu Railway & Land Co. has any interest, within the meaning of that section, in this case or in its issue,—a proceeding the sole question in which was whether or not the respondent was guilty of professional misconduct. The most that can be said is that the Railway Company and its stockholders and bondholders are interested in upholding the validity of the deed from Sumner, but that is a matter which was not involved, either directly or indirectly, in the investigation of respondent's conduct and which cannot be affected by the result of these proceedings. The order made in this case would not even be admissible in evidence in any proceeding brought against the railway company to test the

validity of the deed. As to actual bias or prejudice on the part of the Chief Justice as distinguished from legal or technical disqualifications, that, if there were any, would naturally be under the circumstances in favor of the respondent, but not only is there nothing to indicate any such bias or prejudice but the respondent himself does not contend that there was or is any. On the contrary the respondent in his brief says, "With the * * * * Chief Justice * * I have no complaint nor fault as to his fairness and impartiality".

The statement in respondent's brief that the Chief Justice is a necessary and material witness and that the respondent will call him on a rehearing, if granted, is scarcely worthy of notice. Even if sincere, the suggestion comes too late. That the Chief Justice could possibly give any relevant testimony was not even intimated at or before the trial nor was any desire expressed that he testify; nor is it now intimated what the testimony, if any, is which he would be expected to give if called.

Ground number 1 cannot be sustained. No such complaint was made at or before the trial, but on the contrary the respondent announced himself as ready to proceed.

2, 3 and 13. Only two witnesses are named in this connection. One of them, Maria S. Davis, was in Honolulu at the time of the trial. Apparently she was ill at the time,—how ill does not appear. No showing was made by the respondent why she was not present as a witness nor was any attempt made to obtain her testimony by means of a deposition or otherwise, nor was any continuance asked for. Whether the respondent desired her as a witness or what she could have testified to if she had been present, does not appear. So far as it is the failure of the Attorney General to call her as a witness that is relied upon, that, too, cannot avail the respondent. We know of no statute or rule which makes indispensable the evidence of or a complaint by a client or other party supposed to be aggrieved. The Court may, as it did in this case, of its own motion cause an investigation to be had. There is nothing in Section 1198, C.L., to the contrary.

B. F. Dillingham is the other witness named and the only one absent from Honolulu during the trial. It is not claimed that his testimony would bear upon any charge other than the first. No showing is made as to what his testimony would be if he were called, so that the court may judge of its materiality, relevancy or possible effect. Moreover, the respondent, after stating before the trial or in its early stages that he would like to have Mr. Dillingham as a witness, at the conclusion of the trial expressly said, in effect, that he would not call him but would close without his testimony and submitted the case. Under the circumstances the point cannot now be sustained.

4 and 10. The filing of an information by the Attorney General was not, in our opinion, irregular. No complaint by Mrs. Davis or Mr. Sumner or any other party supposed to be aggrieved was necessary. That the Attorney General had previously reported that he knew of no sufficient cause for presenting charges against the respondent, is immaterial. In instituting the proceedings he acted upon information obtained wholly as to one charge and in large part at least as to the other charges subsequent to the filing of the report. Moreover, he presented the information and conducted the investigation, not of his own motion, but, as we have already said, at the request of this Court.

5. Ratification, if there was any, by the clients or other parties most interested, of misconduct of an attorney, does not bind the court or affect its duty in a proceeding of this nature.

7. This involves a reconsideration of the whole case. The precise question before us is whether such reconsideration shall be had.

8. That the respondent was at the time the order of disbarment was made a District Magistrate for the District of Honolulu, does not constitute a defense to any of the charges made against him nor limit the authority or duty of this court in passing upon his conduct as an attorney.

9. The precise point made in support of this ground is that the respondent was licensed only by the Supreme Court of the Republic of Hawaii and that his license became of no force

when the Republic and its Supreme Court ceased to exist. Assuming, but not deciding, that a new written license might properly have been issued to respondent after the Organic Act took effect, nevertheless the fact remains that thereafter this Court continued to recognize him as a duly licensed practitioner and permitted his name to remain upon the roll of attorneys and counselors, and that the respondent continued to practice in this and other courts of the Territory by virtue of this recognition and permission and not otherwise. In his answer in this case the respondent expressly admits that he is a member of the bar of this court and that he is conducting his profession as a lawyer in Honolulu and his vigorous defense was conducted throughout on the theory that he was then a duly admitted practitioner. The Organic Act did not require those who held licenses as attorneys to take any new oath. Section 19 made this obligatory only upon "every member of the legislature and all officers of the government of the Territory." Under these circumstances, it was clearly within the jurisdiction of this court to have made an order disbarring the respondent and ordering his name stricken from the roll of attorneys and counselors.

12. The question of the admissibility of this evidence was carefully considered at the trial and no reason now appears for holding that there was error in the ruling.

14. The agreement referred to, which purports to have been made between Maria S. Davis of the first part, R. W. Davis of the second part, George A. Davis of the third part and Magoon & Peters of the fourth part, is to the effect, in part, that Maria S. Davis and R. W. Davis agree to give to the other parties, as compensation for their services, one third of all money and other property recovered or received by them "in the matter of the suit now pending in the Circuit Court of the First Judicial Circuit in the matter *The Oahu Railway & Land Co. v. John K. Sumner, et al.*, the case of *John K. Sumner, by his next friend Maria S. Davis v. The Oahu Railway & Land Co.*, and in the matter of the petition for guardianship of John K. Sumner, and all proceedings that may be incidental thereto, or grow-

ing out of all or any of said matters," and also one third of all property or benefits that might be received by them "from the Estate of J. K. Sumner during his lifetime and after his death by way of devise, inheritance or in any other manner," and contains a covenant by Maria S. Davis and R. W. Davis not to settle "said matter" nor to "submit to the withdrawal" of the pending proceedings or of any proceedings that might be thereafter brought, except with the consent in writing of the parties of the third and fourth parts. It is not contended, nor can it be successfully, that the agreement, if introduced, would be of any relevancy so far as the subjects of abuse of process and the method by which the \$2000 fee was obtained are concerned. The argument is that this agreement if in evidence would show that the fee of \$5000 demanded and received by the respondent was authorized by the contract and therefore not excessive, second, that the testimony of the witnesses Magoon and R. W. Davis concerning the attempts at settlement between Sumner, Maria S. Davis and R. W. Davis and the Railway company was untrue, and, third, that Messrs. Magoon & Peters also were guilty with the respondent in the matter of the \$5000 fee and yet have not been punished. Taking the last subdivision of the argument first, a sufficient answer thereto is that in this case the question is not whether Mr. Magoon or Mr. Peters or both are guilty but whether this respondent is guilty, and assuming that Mr. Magoon and Mr. Peters were also guilty that would be no defense on behalf of this respondent.

Assuming that the agreement authorized the respondent and his associates in charging as their fee one third of the amount of money recovered, it clearly did not authorize them to charge or collect one half of that amount and that is what the respondent did when he impeded and delayed the settlement originally agreed upon by Maria S. Davis and Sumner. When the respondent first named \$5000 as the amount of his fee, the only amount mentioned as the one to be paid by Sumner to Maria S. Davis was \$10000,—in short, at no time was \$15000 named as the amount to be received by Maria S. Davis. The \$5000 additional was agreed to be paid by the railway company expressly

to satisfy the claim of the respondent for fees and not as part of the amount to be paid to Maria S. Davis in settlement or otherwise.

We fail to perceive how the agreement if introduced in evidence would tend to show the testimony of the two witnesses named to be false. That the agreement purported to limit Maria S. Davis' power to settle or discontinue and to give the attorneys a veto power in the matter, does not render their testimony less probable or credible. On the contrary, the existence of those provisions, while constituting no justification or defense for the acts and conduct of which the respondent has been found guilty, would seem to add probability and force to any evidence given to the effect that the respondent had attempted to impede and delay the settlement. It may be added that neither during the efforts at settlement of the Sumner litigation nor at the trial of this case did the respondent rely upon or even refer to this agreement. No mention was made at the trial of its existence and no claim that it was material in the investigation then being conducted.

The petitions are denied.

G. A. Davis in person.

Attorney General L. Andrews contra.

DISSENTING OPINION OF GALBRAITH, J.

The reasons given against the judgment of disbarment in this case, *ante*, pp. 241, 242, 243, particularly that "that the findings of fact are not supported by credible testimony", in my opinion, should be sufficient reason for ordering a rehearing. In addition to these the respondent presents two grounds in his application that are entitled to thoughtful consideration, namely, (1) That two members of the court were disqualified to sit in the case, (2) The contract of employment in the first instance offered as additional evidence and as throwing new light on the case.

If the first ground is well taken the judgment should be set aside without regard to the merits on the ground and for the reason that it "was not made by a court constituted as required

by law". *Moran v. Dillingham*, 174 U. S. 153, 158; *Am. Const. Co. v. Jacksonville Railway*, 148 U. S. 372.

In concurring in the judgment of the House of Lords reversing a decree of the Lord Chancellor on the ground that he was a shareholder in a company interested in the decree, Lord Campbell said, "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence." *Dimes v. Grand Junction Canal*, 3 H.L., Cases 759, 792; *Cooley's Constitutional Limitations* (6th ed.) p. 507.

I am assuming in the discussion of this question that neither of my associates were, as a matter of fact, disqualified to sit in the case, still, if, as a matter of law, either was disqualified the judgment of disbarment is voidable, if not absolutely void, and should be set aside.

It has been long recognized as good ground for recusation against a judge that he had a pecuniary interest in the issue to be tried either through himself or a near relative. This principle was recognized by Congress in framing the Organic Act for this Territory and is embraced in Section 84, as follows: "That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issues of which the said judge or juror may have directly or through such relation any pecuniary interest." The respondent is possibly the only person who has any pecuniary interest

in this suit. Certainly there is little if any ground for the claim that either of the judges had any such interest in the issue and are disqualified under the provisions of this section.

This, however, does not dispose of the question. It will be observed that section 84 places "a judge" and "juror" on the same plane in so far as the disqualification of that section is concerned and prescribes that each shall be disqualified when interested in the issue to be tried. It will not be claimed that this section is exclusive, or that there are no other disqualifications than that of interest when applied to jurors. Then can it be claimed with any more reason that there are not other grounds of recusing a judge than pecuniary interest in the suit?

This proceeding was not an appeal but was an original cause in this court. By it the original and not the appellate jurisdiction of the court was invoked. In disposing of it the court not only declared the law of the case but also found the facts to which the law was applied—thus exercising the functions of both court and jury. In this particular, at least, this case is different from the cases usually coming before this court. There was and possibly could not be any material division among the judges as to the law of the case but when it came to the findings of fact, or the things proved by the testimony, there was a material divergence of opinion and thus the exercise of the functions of the jury, in trial courts, was the most important part of the duties of the court in this case.

In the trial of this kind of a cause is it unreasonable to hold that anything that would disqualify a juror in the case if it were tried to a jury in a *nisi prius* court would disqualify a judge from sitting in the case? If the respondent were sued in an action of debt for more than twenty dollars his right to a trial by an impartial jury of his countrymen is guaranteed by the Seventh Amendment to the Constitution of the United States. By the judgment in this case the respondent is not only deprived of something of much greater value than twenty dollars, namely, the right to make a living for himself and family by the pursuit of his occupation but also something which, in the words of Holy Writ, "is rather to be chosen than great riches." Can it be

supposed for a moment that he has not the absolute right to have the facts in a case of such great importance to him passed upon by judges whose minds are free from bias or prejudice? Has he not the right to recuse a judge in the trial of such a cause for the same cause he might challenge a juror if the case were on trial before a jury? I submit that he has.

One of the charges found established against the respondent was blackmailing the Oahu Railway & Land Company out of five thousand dollars. Mr. Dillingham, who acted for the company in the transaction, is the father-in-law of the Chief Justice and the Chief Justice is also a stockholder and the trustee for the bondholders of the Oahu Railway & Land Company. Could the Chief Justice approach the consideration of this case with the same impartial and unbiased mind that he would had the respondent been charged with blackmailing some other person or corporation with whom he was not so closely connected?

Mr. Justice Perry has heretofore punished the respondent at three several times for contempt of court—one sentence being for a term of ten days in jail. Could Judge Perry at the hearing of these charges give to the defendant the full force and effect of the presumption of innocence that the law requires until his guilt was established by competent evidence? Certainly jurors similarly situated when drawn in a trial would be subject to a challenge for cause. The denying of such a challenge under such circumstances would be safe grounds for a new trial.

“Justice requires that the judge should have no bias for or against any individual, and that his mind should be perfectly free to act as the law requires.” *Bouvier, “Bias”*.

An early case wherein a non-freeman was convicted for violating a by-law or ordinance of the City of Chester forbidding any but freemen to keep shop or expose any goods for sale in said city is instructive in this connection. At the trial the defendant challenged the array of the panel because it had been arrayed by the sheriffs who were citizens and freemen of the city. This was overruled and in like manner a challenge to the “polls” because the jurors were citizens and freemen of the

city. The defendant was convicted and on appeal this judgment was reversed and a writ of error was sued out. Lord Mansfield in affirming the judgment of reversal and holding that the challenge to the polls was good on the ground of interest said, in part, "The exclusion of foreigners is a *monopoly to the freemen themselves*. The enforcing of this exclusion, by by-laws and penalties, is securing that monopoly. And in this action, the very freemen who were to gain by securing this monopoly, were the jury to determine it. Therefore *every* freeman had an interest and bias in the matter of the issue to be tried in this cause. It is no answer to the objection to say, 'that they were to have no part of the penalty'; for still they had a bias upon them in relation to the question to be tried. Whatever the action may be, if jurors be interested in *any* of the matters in issue, he is unfit to try them. The incapacity arises from his bias in the particular facts he is to try; and whatever be the facts which that bias touches, he is incapable of trying those facts": *Hesketh v. Broddock*, 3 Burrows, pp. 1847, 1857. And again on the question of interest the same distinguished authority says: "The law has so watchful an eye to the pure and unbiased administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If, therefore, the *sheriff*, a *juror*, or a *witness* be in *any sort interested* in the matter to be tried, the law considers him as under an influence which may warp his integrity, or pervert his judgment; and therefore will not trust him. The *minuteness* of the interest won't relax the objection. For the *degrees* of influence can't be measured; no line can be drawn, but that of a total exclusion of all degrees whatsoever." *Id.*, p. 1846.

"Interest, in the issue to be tried, is a good and sufficient ground of challenge to a juror; so interest, in the question to be determined by a judge in this court, is a good and sufficient disqualification. No man can sit in judgment in his own case. Natural reason and natural justice forbid it, and so does the common law. No matter how slight the interest which a juror may have in the issue; if he has any, the common law will not permit him to try the cause—so with a judge." *Trustees Int. Imp. Fund v. Bailey*, 10 Fla. 213, 230.

"The law carefully guards not only against actual abuse, but even against the appearance of evil, from which doubt can justly be cast upon the impartiality of judges, or respect for their decisions may be impaired." *In re Didge and Stevenson Mfg. Co.*, 77 N. Y. 101, 110.

If it were possible that each of my associates could and did approach the consideration of this case free from bias, still the law which considers the weakness and frailty of human nature regards such a thing under such circumstances as impossible. If the right to urge this ground of recusation was waived by failure to raise it before or pending the hearing still it has been raised on this application and in order to avoid the appearance of having failed to render full justice to the respondent it should have great weight in inclining the court towards granting a rehearing.

The second ground was the additional evidence offered by the contract for fees. It is claimed that this contract was lost and was not found until after the decision in the case and through inadvertence and inability it was not produced at the hearing. The contract is alleged to have been prepared by one of the counsel associated with the respondent. This contract is as follows:

"THIS Agreement made between Maria S. Davis, of the First part, R. W. Davis, of the second part, George A. Davis, of the third part, and Magoon & Peters, of the fourth part,

WITNESSETH: "That said parties of the first and second parts hereby agree to give to said parties of the third and fourth parts one-third of all sums of money, evidences of indebtedness, choses in action and property recovered by them and each of them or to which they and each of them may be entitled or which they and each of them may receive in the matter of the suit now pending in the Circuit Court of the First Judicial Circuit in the matter

R.W.D. G.A.D. M.S.D. of J.A.M.	{	The Oahu Railway & Land Co. v. John K. Sumner, et al., the case of John K. Sumner by his next friend Maria S. Davis v. The Oahu Railway & Land Co., and in the matter of the petition for guardianship of John K. Sumner, and all proceedings that may be incidental thereto, or growing out of all or any of said matters.
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and they also agree to give a like one-third of whatever property

or benefits they and each of them may receive from the Estate of John K. Sumner during his lifetime or after his death by way of devise, inheritance, or in any other manner, upon all of which said parties of the third and fourth parts shall have a lien and first charge upon all sums of money, claims and property received by said parties of the first and second parts and each of them as hereinabove set forth.

Clerk
J.A.T. "And they further agree to pay all costs of court in said suit or matter or in any other suit or proceedings which may be brought in the premises.

"And said parties of the third and fourth parts hereby agree to give their professional services in said matter or matters until final adjudication in the Supreme Court of the Territory of Hawaii and receive as full compensation therefor said one-third to be paid to them as aforesaid for all services which may be rendered in the matter; said one-third to be divided between them as follows: Said party of the third part an equal one-half of said one-third, and said parties of the fourth part an equal one-half of said one-third.

"And said parties of the first and second parts hereby covenant and agree that they will not settle said matter with said John K. Sumner or with any other persons excepting with the full and free consent of said parties of the third and fourth parts thereto obtained in writing, nor will they submit to the withdrawal of said proceedings that are now before the Court or any other proceedings that may be brought in the discretion of said parties of the third and fourth parts without such consent in writing of the parties of the third and fourth parts.

"In Witness Whereof said parties do hereunto set their hands and seals this 30th day of December, 1902.

"MARIA S. DAVIS,

"R. W. DAVIS,

"GEO. A. DAVIS,

"MAGOON & PETERS."

This contract, possibly, would not have established respondent's innocence of the charges against him if it had been produced and given in evidence at the hearing. But it does tend to disprove one of the charges found against him, namely, that he did "impede, hinder and delay a settlement of a suit that his client was willing to make" without right so to do. It further tends to prove that the other attorneys who signed this contract

with respondent were guilty of gross abuse of the process of the courts in making a contract for fees for one-third of the amount that might be recovered in an injunction suit and one to declare a man *non compos*, when the legitimate object of neither suit was to recover money, nor could either suit have resulted in a money judgment if prosecuted in good faith to final judgment.

This contract certainly tends to demonstrate one further fact, namely, that the court has not done full and complete justice in this case although the respondent may be guilty as found and also that full and complete justice will not be done in this case by disbarring the respondent and permitting the two attorneys associated with him in the enterprise to go unscathed. The Court ought to re-examine the charges in the light of this new evidence in order to make sure that no innocent man is punished and that no guilty one escapes.

TAI LAN *v.* PILIPO CONTRADES.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

SUBMITTED JANUARY 12, 1904. DECIDED JANUARY 19, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Non-owners having executed two leases to different persons and the owner being estopped by his conduct from denying the validity of either lease, and the first lessee's assignee being in possession, equity cannot decree delivery of possession or damages against the owner at the suit of the second lessee.

OPINION OF THE COURT BY FREAR, C.J.

Prior to 1896 a deed was executed and recorded purporting to convey the land in question from the defendant to his three children by Hokela. In January, 1896, one of these children,

then a minor, executed a lease of the land to one Morgan for ten years with a privilege of renewal. In January, 1901, this child, then of age, and Hokela, as guardian of the other two, though she had not received her letters of guardianship or filed her bond, executed a lease of the land to the plaintiff for ten years with a privilege of renewal. In June, 1902, the defendant obtained a decree, in a suit to quiet title, that the deed of 1896 to his children was fraudulent and void and that he was owner of the land. Morgan took possession under the first lease, and his assignee now has possession thereunder. The plaintiff has been unable to obtain possession under the second lease.

This is entitled a suit for specific performance. The allegations of the bill are somewhat uncertain but it is manifest that the suit is one to compel the defendant to deliver possession to the plaintiff and for damages. The plaintiff relies on an estoppel from the fact that the defendant at the time of the execution of the second lease represented that the land belonged to the children and that they could lease it. The defendant contends that the plaintiff knew all about the first lease and that the understanding was that he should buy out the holder of that lease. There were several other points in dispute. The Circuit Judge found against the defendant, but allowed damages only and not possession because the defendant was estopped as to the first lease also, by his representations made at the time that was executed, and so could not deliver possession. We will assume that the defendant is estopped from denying the validity of the leases.

Neither the lessee's assignee in possession under the first lease nor the lessors in the second lease are made parties. The second lease, under which the plaintiff claims, has been executed and delivered. The defendant was not a party to that, and entered into no covenant or promise in or out of that lease to execute a lease or to deliver possession or to do anything else. He does not have possession. And yet a bill is brought to compel him to specifically perform—what? by delivering possession and paying damages. At best the bill is merely for possession and dam-

ages, an ejectment bill, which, of course, should be dismissed as not within the jurisdiction of equity. *Kuala v. Kuapahi*, ante p. 300.

The decree appealed from is set aside, and the case remanded to the Circuit Judge with directions to dismiss the petition and for any other or further proceedings consistent with this opinion.

S. K. Kaeo and *A. G. Correa* for plaintiff.

M. F. Prosser for defendant.

IN THE MATTER OF THE GUARDIANSHIP OF RE-
BECCA PANEE HUMEKU, a Spendthrift.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 2, 1903. DECIDED JANUARY 22, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A guardian who is an attorney at law may, in a proper case, be allowed extra compensation for professional services rendered for the benefit of the ward.

Under the circumstances of this case, a fee of \$1250 held excessive and \$250 allowed as a reasonable fee.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., Dissenting.)

This is an appeal by the ward, by her next friend, from an order of a Circuit Judge allowing J. A. Magoon, the guardian, the sum of \$1250 as compensation for professional services rendered by him as attorney in resisting an application made by the ward for a termination of the guardianship. The allowance is sought to be set aside on the grounds, first, that Magoon's appearance was not on behalf of the ward but for his own benefit in order to secure a continuation of the relationship

of guardian and ward and the emoluments to himself arising therefrom, and, second, that the sum allowed is excessive.

As we understand the argument for the ward, it is not contended that extra compensation may not in any case be allowed a guardian who is an attorney, for legal services rendered. Elsewhere the decisions on the subject are not uniform. In this jurisdiction it has become the established practice to allow such compensation in proper cases. See *In re Estate of Kalua Kapukini*, 14 Haw. 204; *Magoon v. Brash et al.*, 11 Haw. 204, and also *In re Estate of Hiram Maikai*, 3 Haw. 522. In the case at bar, Magoon's appearance and his resistance of the application were for the benefit of the ward; it was the guardian's duty, under the circumstances of the case, to appear and defend. Upon the record we find no reason for holding that the resistance offered was solely in the personal interest of Mr. Magoon.

Was the fee allowed excessive? The application for termination of the guardianship seems to have been based upon two grounds, (1) that the adjudication that the ward was a spendthrift should not have been made and (2) that the guardianship was no longer necessary. The answer was a denial of the essential averments of the petition and an assertion that the guardianship was still necessary. The Circuit Judge after trial granted the application but on appeal his decree was reversed and the application denied. Evidence was taken before the Circuit Judge on four separate days and on three or four other days counsel appeared in court upon other details of the hearing. In this court, the proceedings consisted of a motion to dismiss the appeal, which motion was argued and passed upon within a few minutes, and on another day a submission of the main case without oral argument. The guardian's brief was less than four pages in length. The issues arising upon the application were mainly of fact and of no great difficulty. In addition to these services, the guardian also appeared before a Circuit Judge upon a motion of Mr. Fitch, counsel for the ward, for an allowance of fees, the proceedings consisting of an order, on one day, for a continuance, and, on another day, a hearing and ruling upon the matter. The main trial, it may

be added, must have involved some preparation in the examination of witnesses and otherwise, although there is no evidence in this case on the subject.

Circuit Judge Gear, who made the allowance of \$1250 appealed from, heard no testimony as to the value of Mr. Magoon's services but evidently acted upon his own knowledge of the proceedings had and of the services rendered. It is stipulated, however, in this court, although the record does not show this and although the order appealed from recites that there was no dispute as to the value of the services, that certain evidence theretofore taken before Circuit Judge De Bolt bearing upon the question of the value of Mr. Fitch's services in presenting the application was by agreement considered as evidence on Mr. Magoon's application before Judge Gear. This latter evidence, and more particularly the expert testimony of Messrs. Stanley, Robertson and Hatch, members of the bar, is much relied upon by the appellee in support of the allowance made. The evidence of Messrs. Stanley and Robertson was, in brief, that the services of Mr. Fitch, as stated in the hypothetical question propounded, were reasonably worth from \$1000 to \$1500, and that of Mr. Hatch was that such services were worth from \$1500 to \$2000. Assuming that the evidence of these experts is properly before us, we do not regard it as entitled to much, if any, weight on this issue. In the first place, the witnesses testified concerning the services of Mr. Fitch and not concerning those of Mr. Magoon. One of the witnesses laid a great deal of stress upon the standing, experience and ability of counsel and the two others also considered that an element in measuring the compensation; and all three, if we may judge from their estimates of value, regarded Mr. Fitch's standing, experience and ability as of a very high order. Whether or not they would place Mr. Magoon in the same class in those respects, it is impossible for us to say without indulging in conjecture. The witnesses, secondly, based their estimates very largely upon the fact that the services rendered consisted of an attempt to rid the ward of the guardianship and to restore to her full control over her property. Mr. Magoon's services were in opposi-

tion to that attempt and his energies were directed to the upholding and continuance of the guardianship. Then, again, the hypothetical question upon which the testimony was based, did not correctly state the facts material to be considered with reference to Mr. Magoon's fee. The questions assumed that, in addition to the services in the Circuit and Supreme Courts, Mr. Fitch had for a period of fourteen months acted as the legal adviser of the ward. No such services are claimed to have been rendered by Mr. Magoon. The question also assumed that the ward's property was of the value of from \$30000 to \$40000, although on cross-examination two of the witnesses testified with reference to a property value of \$25000. The evidence is that the property did not exceed in value \$22670 and was perhaps less.

In making the allowance appealed from, the Circuit Judge, as appears from his written opinion, seems to have been largely influenced by the fact that Mr. Fitch, who had been unsuccessful in the attempt to have the guardianship terminated, had been awarded a fee of \$1250 and reasoned that opposing counsel whose efforts had been successful should have at least as much. In this connection it may be noted that at the hearing before Judge De Bolt the ward consented to a fee of from \$1000 to \$1500, that no evidence was adduced by the guardian as to the value of Mr. Fitch's services, and that practically the only contest by the guardian was on the question whether any fee at all should be allowed. In any event, this court is not bound by the standard of measurement adopted by the Circuit Judge. It may be added that no more can be allowed to Mr. Magoon than the latter, as guardian, would have been, under all of the circumstances of the case, justified in paying if he had employed other counsel; and in the latter event, acting, as he was, in a fiduciary capacity, he would not have been at liberty to employ counsel at fancy figures but it would have been his duty to bear in mind always the ability of the ward's estate to pay, as well as the other circumstances, and to secure assistance at a cost that would be reasonable.

There is, then, before us no expert evidence entitled to weight

on the subject of the value of Mr. Magoon's services. Whatever the rule may be in cases where there is such evidence, the court in this case is at liberty, and it is its duty, to give its own estimate of the value based upon the evidence as to the nature and extent of the services and the other circumstances generally. In our opinion, Mr. Magoon should be allowed, for his services in question, a fee of not exceeding two hundred and fifty dollars.

The order appealed from is reversed and the cause remanded to the Circuit Judge for such further proceedings, not inconsistent with this opinion, as may be proper.

E. M. Watson, next friend, for the ward.

J. A. Magoon, guardian, in person.

DISSENTING OPINION OF GALBRAITH, J.

The "established practice", in this jurisdiction, of allowing additional compensation to administrators and guardians, for legal services rendered by themselves, rests upon no stronger ground, it seems, than an occasional allowance of such claim.

The rule seems to have been adopted first in *In re Hiram Maikai*, 3 Haw. 522. The court in that case denied the claim but said, "The court would allow professional charges for services rendered to the estate in all cases where such services are necessary, and would allow them to the administrator if he should be a lawyer, whensoever they would allow them to an administrator who is not a lawyer," p. 525. No attempt was made by the court to justify the adoption of the rule by argument or the citation of authorities of any kind. It seems to have been taken as a matter of course that such claims were proper allowances and should be made in some cases. The two subsequent cases cited followed the earlier case as an authority without question.

These cases are not sufficient authority to warrant me in following a rule that is so clearly erroneous.

The practice of allowing fees, in addition to the statutory commissions, to members of the bar who may be guardians, or act in other trust capacities, for legal services is wrong in theory

and pernicious in practice. It was never contemplated that the office of guardian should be one of great profit or that it should be sought on account of its emoluments. The position of guardian is not thrust upon one against his will. It is usually sought for. Philanthropy and not avarice is supposed to be the motive that should prompt one to seek the place.

To permit Mr. Magoon, the guardian, to employ Mr. Magoon, the attorney, to represent the guardian in a law suit and allow him a fee of \$1250 or any other amount from the estate, would place the guardian in a position where *his interest* might oppose *his duty*.

Such an allowance could not be sustained at common law nor will our statute permit it. Section 1983 C.L., the only statute that gives any basis for the claim, reads as follows: "Every guardian shall be allowed the amount of all his reasonable expenses incurred in the execution of his trust, and he shall also have such compensation for his services as the court in which his accounts are settled shall consider to be just and reasonable."

An examination of the accounts of the guardian shows that he has claimed and been allowed annually the commissions of 10% and 7% prescribed by Section 1493 C.L. This I contend is the "compensation for his services" authorized by Section 1983 and was intended to be in full satisfaction and cannot authorize extra allowance for legal services rendered by the guardian in his capacity as an attorney-at-law.

The Supreme Court of Illinois in denying a claim of this character presents the question so clearly that I feel justified in quoting the opinion in full:

Caton, C.J., says, "The only question in this case is, whether an attorney of this court, who is an administrator, is entitled to an allowance against the estate, for professional services, in cases which he prosecutes or defends as such administrator. The authorities are uniform that this should not be allowed, and every principle of sound policy forbids it. The law cannot permit the idea that a person can take the office of executor or administrator as a business or as a means of making money. It must ever associate with that place, to a certain extent, the

idea of benevolence or philanthropy. We must ever assume that whoever takes such a position is actuated by an impulse of generosity and a desire to do good to others, rather than to make it a source of profit to himself. He must not be expected to suffer loss in the discharge of his duties, hence he must be allowed his necessary disbursements, and a reasonable compensation for the time and trouble bestowed upon the business of the estate. But beyond this the court should never go. If he chooses to exercise his professional skill as a lawyer in the business of the estate, that must be considered a gratuity. To allow him to become his own client and charge for professional services in his own name, although in a representative or trust capacity, would be holding out inducements for professional men to seek such representative places to increase their professional business, which would lead to most pernicious results. This is forbidden by every sound principle of professional morality as well as by the policy of the law." *Willard v. Bassett*, 27 Ill. 36.

For other cases of like import see *Hough v. Harvey*, 71 Id. 72; *Gray v. Robertson*, 175 Id. 242; *Collier v. Munn*, 41 N. Y. 143; *Doss v. Stevens*, 13 Colo. Appls. 535; *Kuhn's Appeal*, 4 Wash. 534; *Taylor v. Wright*, 93 Ind. 121.

The claim for attorney's fees by the guardian should be disallowed altogether.

T. R. MOSSMAN v. S. M. DAMON, J. O. CARTER, W. F. ALLEN, C. M. HYDE and W. O. SMITH, Trustees under the Will of B. P. Bishop.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 18, 1903.

DECIDED FEBRUARY 1, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The return in a case of substituted service of process should show on its face the existence of the conditions under which the statute permits such service. Extrinsic evidence is inadmissible to show this.

A motion to amend a complaint by substituting an alleged newly appointed trustee in the place of an alleged deceased trustee, one of five joint trustee defendants, is properly overruled, when no showing is made that the proposed substitute has been so appointed.

A defect in the service of summons apparent on the face of the return may be taken advantage of by motion to quash.

At common law, service must be made on all of several joint trustee defendants.

The statute (C. L., Sec. 1222), which permits service on less than all of joint or joint and several makers of notes, &c., does not apply to joint trustees in a statutory action at law to quiet title.

A summons or its service may be quashed for failure of the return to show a service on one of five joint trustee defendants, when no alias summons or service is asked for and no amendment of the return is made showing a good original service.

OPINION OF THE COURT BY FREAR, C.J.

This is a statutory action to quiet title. The defendants, appearing specially for the purpose, moved to quash the summons or the service thereof on the ground that it was not served on the

defendant C. M. Hyde. The motion was granted and the plaintiff excepted. He excepted also to several preliminary rulings rejecting offers made by him to remedy the alleged defect.

The return shows that personal service was made on all the defendants except C. M. Hyde, and "on C. M. Hyde by leaving a certified copy of the original herein at the office of the trustees under the will of B. P. Bishop, in charge of A. C. Lovekin, Secretary, at Honolulu, Island of Oahu, on the 14th day of July, A. D., 1899, as directed." It is said that this defendant was then absent from these islands. The statute (C. L., Sec. 1218, as amended by Act 5 of the Laws of 1898) provides that the summons shall be served "upon the defendant, by the delivery to him of a certified copy thereof, and of the plaintiff's petition, * * * or in case the defendant cannot be found, by leaving such certified copy with some agent or person transacting the business of the defendant, or at the defendant's last place of residence." It thus appears that the statute permits substituted service by leaving a copy with an agent only when the defendant cannot be found, and the return does not show that the defendant in question could not be found. It may be that, if it were a fact that he could not be found, the return could have been amended to show that fact, or, if the former attempted service was not good, that a new service could be made. But although the record shows that a motion to allow such an amendment was made, the refusal to allow it is not made the subject of any of the exceptions on which the case is now brought to this court. Whether the refusal was based on the ground that there was not sufficient evidence to show that the defendant could not be found, or on the ground of laches in neglecting to make the motion for more than two years and four months after the motion to quash was made, or on some other ground, does not appear.

Of the exceptions to the preliminary rulings rejecting various offers of the plaintiff made for the purpose of curing the alleged defect in the service or the return thereof, one was to the refusal of the court to allow the plaintiff to prove by affidavit that C. M. Hyde was not within the jurisdiction of the court at the time the return was made; and another was to its refusal to allow

him to prove this by the testimony of the officer who served the writ. It is well settled that statutes which permit substituted service must be strictly followed, that the return of the officer who serves the process, must, taken in connection with the record, show that the conditions existed on which the statute permits substituted service and that the existence of such conditions cannot be shown by extrinsic evidence in order to prove that the service was sufficient. *Settlemier v. Sullivan*, 97 U. S. 444; *The Madison Co. Bank v. Suman*, 79 Mo. 527; *Matteson v. Smith*, 37 Wis. 333; *Clark v. Little*, 41 Ia. 497; *Gardner v. Small*, 17 N. J. L. 162; *Thompson v. Griffis*, 19 Tex. 115.

Another exception was one taken to the refusal to allow in evidence the probate record in the matter of the estate of Bernice P. Bishop which was offered for the purpose of proving that service on three out of five trustees would bind all. It is intimated orally that there is a provision in the will of Bernice P. Bishop to the effect that three of the five trustees may act. Whether such a provision would permit a third party to select three and compel them to act we need not say. It is sufficient to say that there is nothing in the record to show that the will contained such a provision or any provision bearing on this point. We cannot say that error was committed in rejecting the offered evidence.

Another exception to a preliminary ruling was one taken to the refusal of the court to allow the plaintiff to amend the complaint by making one A. W. Carter a party defendant in the place of C. M. Hyde. We cannot say that this ruling was erroneous. Whether the court might properly in the exercise of its discretion have disallowed the proposed amendment on the mere ground of laches, we need not say. So, also, as to whether such a motion could properly be granted at that stage of the proceedings, before the disposition of the question whether the trustees were properly before the court at all. It is claimed that C. M. Hyde died a few months after the commencement of the action and that A. W. Carter took his place as a trustee under the will. But it does not appear that any showing or allegation or statement was made of the appointment of the latter. It is also at

least doubtful if we can consider that any suggestion was made of the death of the former,—although there is a paper, not filed but marked in pencil for identification, purporting to be a motion that on the suggestion of the death of C. M. Hyde “herewith filed”, an amendment be allowed by striking out that name wherever it occurs in the petition and inserting in place thereof the name of A. W. Carter and that service of the amended complaint be made on said Carter; and also an affidavit similarly marked but not filed, which appears to have been offered at a different time and for a different purpose, to the effect that C. M. Hyde was absent at the time process was issued and returned, and that he returned soon afterwards and died about a week later. The bill of exceptions and the clerk’s minutes show merely that a motion was made to substitute Mr. Carter for Mr. Hyde. They show nothing as to a suggestion of the latter’s death or as to any motion for service on Mr. Carter.

The last and main exception was taken to the allowance of the motion to quash the service of summons.

A defect in the service apparent upon the face of the return may be taken advantage of by motion to quash. A plea in abatement is not necessary, as contended by the plaintiff. A plea would be proper if the defect could be shown only by extrinsic evidence. 19 Enc. Pl. & Pr. 707, 709, and cases there cited.

The principal question is whether service on four of the trustees was sufficient. The complaint is against the defendants as trustees under the will of B. P. Bishop. It alleges that they claim the land adversely to the plaintiff, that the plaintiff is desirous of determining said adverse claim, and that they are necessary parties to the complete determination and settlement of the question involved. The prayer is that they may be summoned, &c., and required to set up any adverse claim that they may have, &c. The action is at law. Trustees presumably hold jointly. They are one body—a collective trustee, and service must, in the absence of statutory provision to the contrary, be made on all. Such is the rule at common law. *Barton v. Petit*, 7 Cr. 194; *Draper v. Moriarty*, 45 Conn. 476; *Goodhue v. Palmer*, 13 Ind. 458; *McGeorge v. Bigstone G. I. Co.*, 88 Fed. 599;

Sayre v. Sayre, 17 N. J. Eq. 342; 22 Enc. Pl. & Pr. 189; 19 *Id.* 632; 1 Perry, Trusts, Sec. 411. There is no statutory provision here to the contrary applicable to this case. The only statutory provision relied on is C. L., Sec. 1222, which reads as follows:

“It shall be necessary to join as defendants in a civil action, all the joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange, or orders, or joint and several obligors, lessees, or parties of the first or second part to covenants, agreements and contracts, in suing for non-payment, non-acceptance, or non-fulfillment thereof, but it shall in no case be necessary to serve all the joint parties sued with process. Service of process upon one of several defendants at law, shall be legal service upon all for the purposes of appearance in Court, and judgment may be entered against all such co-defendants thereon; provided, however, that no execution shall issue against the sole property of any joint defendant on whom process was not duly served as aforesaid.”

It being plain that the first portion of this section does not apply, the last portion is relied on. But the last portion is not an independent provision to be read by itself alone. It must be read in connection with the first portion. That would be natural considering the relation of the two parts and their subject matter. Moreover, if the last portion were intended to be read separately, it is so broad that it would be unnecessary to set forth the particulars in the first portion. Again, the first portion concludes with the provision that it shall not be necessary to serve all the defendants joined under that portion. From this it would naturally be inferred, if the last portion were not intended to qualify this, that service on one of several joint defendants would be sufficient to justify execution against the sole property of each as well as the joint property of all, as would be the case if all were served, which, of course, could not have been intended. Further, the last portion, if read by itself, relates to “several defendants” without reference to whether they are “several joint” or “several several” defendants. It is only when read in connection with the first portion that this is shown to mean “several joint” or “several joint and several” defendants, and not “several several” defendants.

Whether it is too late for the plaintiff to take further steps that will be of avail to him we do not know. He had nearly two and a half years in which to remedy the alleged defect, and after the motion to quash was finally called up for disposal, continuances were twice granted in order to give him opportunity to do what he could, and after one of the hearings the order allowing the motion to quash was set aside and a further hearing granted before the order was made finally.

The exceptions are overruled and the case remanded to the Circuit Court for such further proceedings as may be proper consistent with this opinion.

W. R. Castle, P. L. Weaver and W. L. Whitney for plaintiff.
Kinney & McClanahan and S. H. Derby for defendants.

OAHU RAILWAY and LAND COMPANY *v.* EWA PLANTATION COMPANY and KAHUKU PLANTATION COMPANY.

MOTION FOR REHEARING.

SUBMITTED JANUARY 20, 1904. DECIDED FEBRUARY 6, 1904.

GALBRAITH AND PERRY, JJ., AND CIRCUIT JUDGE DE BOLT IN PLACE OF FREAR, C.J., DISQUALIFIED.

A rehearing will not be granted merely because the court in its former opinion did not set forth its reasoning upon a certain point now claimed to have been overlooked, provided the point was not in fact overlooked and the court's *conclusion* thereon was in fact stated.

OPINION OF THE COURT BY PERRY, J.

The only ground now relied on in support of the motion is that the court overlooked the point made by the defendants at the hearing that "the interest of the Oahu Railway and Land Company in each of the demised premises is a separate item and as such is to be separately taxed." If by this is meant that the interest of the Railway as distinguished from that of James Campbell and that of each of the two defendants should be separately taxed, it is sufficient to say that the statement of agreed facts on file clearly shows that each of those four interests has been so taxed. The contention seems to be, rather, that the plaintiff's leasehold interest in the lands demised to the Ewa Plantation Company and its interest in the lands demised to the Kahuku Plantation Company are separate items within the meaning of Section 820 of the Civil Laws, which provides that "all real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof * * * ", and that the assessment of the plaintiff's interest in Kahuku and Honouliuli jointly is in contravention of this provision and therefore illegal.

The argument can be made that since the plaintiff acquired its leasehold interest in the two lands, together with other parcels, under one lease, with one lump sum named as rent therefor and with covenants and other terms applicable to all such lands as a whole, such interest in all of the lands constitutes but one item within the meaning of the statute and that there was no departure from the directions of the statute in making the return or assessment or both. Assuming, however, without deciding, that a strict compliance with the provision in question would have required that the plaintiff's interest in each of the lands should have been separately assessed, the failure to do so, under the circumstances of this case, would not render void the assessment as actually made. The defect would at most be a mere irregularity which cannot be taken advantage of on collateral attack, such as that now being made. The interests in the various parcels, if they may properly be called interests, all be-

longed to the same owner and in this respect this case differs materially from those cases where, the lands of more than one owner being involved, joint assessments have been held invalid. The plaintiff was the only taxpayer directly liable to the government for the taxes upon its interest (the existence of the private agreement of the sublessees to pay a portion of the taxes cannot affect the matter.) The requirement of Section 820, whether intended by the legislature for the benefit of the government or of the taxpayer, was, if it was not complied with, waived by both the government and the taxpayer and the tax as assessed was voluntarily paid. The irregularity, if any, was such as could have been waived. See *Albany Brewing Co. v. Meriden*, 48 Conn. 243, 245.

The point now relied upon by the defendants was not overlooked when the case was originally before us. In our former opinion we said: "It is no defense that the taxes were not assessed upon the subleased portions of land separately." It is true that we did not set forth our reasoning any further than to remark that "the private agreement of the parties was not binding on the assessor and the latter was under no obligation to make a separate assessment by reason of such agreement", but the *conclusion* was stated. The defense attempted was that the taxes were not assessed upon the subleased portions of land separately, and we expressly held that that defense was not good. The mere omission of a statement of the reasoning leading to that conclusion is not a sufficient ground for granting a rehearing. We have here discussed the merits of the defendants' argument to the extent to which we have discussed it, not under any misapprehension that a rehearing has been granted but because it will doubtless prove more satisfactory to counsel to have presented a statement of the reasoning omitted from the former opinion.

The motion is denied.

Hatch & Ballou for plaintiff.

Castle & Withington for defendants.

C. M. COOKE v. A. N. KEPOIKAI, Treasurer, Territory of
Hawaii.

APPEAL FROM ASSESSMENT OF STAMP TAX.

SUBMITTED JANUARY 25, 1904. DECIDED FEBRUARY 11, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The stamp duty, payable under Section 941, Chapter 64, Civil Laws, on account of a deed of conveyance should be assessed on the total amount of the consideration money therein expressed, even though this is stated to be the aggregate amount of several separate bids for distinct lots and blocks and each tract and the amount bid therefor is set out in detail in the deed.

OPINION OF THE COURT BY GALBRAITH, J.

This is an appeal under Section 931, Civil Laws, from the decision of the Treasurer assessing the stamp tax on a deed of conveyance.

The plaintiff as attorney in fact for a mortgagee under a power of sale contained in the mortgage advertised the mortgaged premises and caused them to be sold at public auction. The property is located in the District of Honolulu in a contiguous tract but has been surveyed into lots and blocks. At the sale lots and blocks were offered and sold separately, ranging in price from two hundred dollars to two thousand four hundred dollars, but the plaintiff was the purchaser in each instance. One deed was executed covering all of the property sold and reciting, in part, as follows: "In consideration of the sum of sixty-two thousand three hundred (\$62,300.) dollars to them

paid by the Charles M. Cooke, Limited, corporation aforesaid, party of the second part, which said sum of sixty-two thousand three hundred (\$62,300.00) dollars, in the aggregate, is the total of the several purchase prices of separate and distinct blocks, lots and tracts of land within said mortgage premises, the respective purchase prices being hereinafter set opposite the description and designation of the blocks, lots and tracts of land so as aforesaid purchased at said sale, receipt of said sum total of sixty-two thousand three hundred (\$62,300.00) dollars being hereby acknowledged, do hereby grant, bargain, sell and convey," etc. This deed also gives a detailed description of each tract sold and the purchase price bid for the same.

The plaintiff claims that the stamp tax should be calculated on the separate prices bid for the several lots and blocks as set out in the deed and not on the aggregate amount of the purchases. By the first method the tax would be two hundred and one (\$201.00) dollars and by the second three hundred and fifteen (\$315.00) dollars.

The assessment was made under the following schedule, as given in Section 941, Chapter 64, C.L.: "Conveyances upon the sale of any property, real or personal, or rights therein, upon the principal or only deed or instrument, when the purchase or consideration money therein expressed shall not exceed

\$500	\$1.00
And when exceeding \$500 and not exceeding \$1,000....	2.00
And when exceeding \$1,000 and not exceeding \$10,000, or fractional part thereof	3.00
And when exceeding \$10,000 and not exceeding \$50,000 for every \$1,000 or fractional part thereof	4.00
And when exceeding \$50,000 for every \$1,000, or frac- tional part thereof	5.00"

It is also contended on behalf of the plaintiff that Section 923, C.L., reading, "Every instrument containing distinct matters, or made for more than one consideration, shall be stamped on each matter or consideration," supports his construction of the schedule. It does not appear that this instrument was made for

more than one consideration nor is this view sustained by the decision of this court construing said section, *Minister v. Castle*, 8 Haw. 105.

The cases cited by counsel holding that at public auctions the contract of sale is complete when the successful bidder is declared have been expressly followed by this court. *Morgan v. Betters*, 13 Haw. 685. We still believe that those cases announce the correct rule on that question but do not see how that rule is applicable to this case.

The stamp tax under this schedule is not assessed on the contract of sale but upon the "conveyance upon the sale of any property" and "the purchase or consideration money therein expressed."

The schedule under consideration is plain. There is no ambiguity about it and consequently no room for construction. The purchase or consideration money recited in this deed is sixty-two thousand three hundred (\$62,300.00) dollars, and on that amount the tax should be assessed.

The appeal is dismissed. It is so ordered.

D. H. Case and *C. F. Clemons*, attorneys for plaintiff.

L. Andrews, Attorney-General, for defendant.

OAHU LUMBER & BUILDING CO., LTD., v. C. DING SING, as Trustee for Oy Shock Kee Co., an unincorporated Society, and C. T. Akana.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED DECEMBER 4, 1903. DECIDED FEBRUARY 19, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The writ of *ne exeat* is not now available, in an action of assumpsit, to prevent a defendant from going away from the Territory or to compel him to give security for the payment of the judgment that may be recovered.

The execution of the writ would subject the defendant to imprisonment for debt contrary to the provisions of the Organic Act.

OPINION OF THE COURT BY GALBRAITH, J.

The plaintiff commenced an action in assumpsit, in the Circuit Court, to recover the sum of \$296.16 from the defendants. It is alleged in the petition that one of the defendants, C. Ding Sing, seeks to avoid the payment of the debt and is about to remove his property out of the jurisdiction of the court and is about to depart beyond seas and prays that a writ of *ne exeat* issue directed to the High Sheriff commanding him to forthwith arrest C. Ding Sing and hold him subject to the further order of the Court unless the "said C. Ding Sing shall enter into security with sufficient sureties in the sum of \$600, not to depart, or attempt to depart from the Territory of Hawaii without leave of the court."

The Circuit Judge issued an order to show cause and after a

hearing declined to issue the writ. This ruling was excepted to and is complained of as an error.

The sole question presented for decision in this case is whether it was error for the Circuit Judge to refuse to issue the writ.

The writ prayed for in the petition must be regarded as the law writ of *capias ad respondendum* under Sections 1233, 1239, Civil Laws, and not the equity writ of *ne exeat* under Section 1145, Civil Laws, as amended by Session Laws of 1903, Act 32, Section 11. It will not be necessary in this cause to decide whether the inhibition of imprisonment for debt in the Organic Act extends to the equitable writ of *ne exeat*, the object of which is to secure equitable bail. Provisions of this character elsewhere have been construed not to extend to such writs, (*Dean v. Smith*, 23 Wis. 483; *Brown v. Haff*, 5 Paige 235), although it is probable, under the provisions of our Organic Law, that no distinction should be made between the two classes of writs or proceedings whether called *ne exeat* or *capias ad respondendum*.

Chapter 108, Civil Laws, providing for the "arrest of debtors" is specifically repealed in Section 7 of the Organic Act and in order to demonstrate more clearly, if possible, an intention on the part of Congress to prohibit the use of the criminal arm of the law, in this Territory, in enforcing the collections of debts, it was provided, in Section 10, of the Organic Act, that "no person shall be subject to imprisonment for non-payment of taxes nor for debt."

The word imprisonment has a well-settled meaning in the law and is defined as follows: "The confinement of the person, in any wise, is an imprisonment; so that the keeping of a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment." 1 Blackstone, p. 137.

The basis of the plaintiff's demand for the writ being a debt it would be impossible for the sheriff to execute the writ in any manner without subjecting the defendant to imprisonment for debt within the inhibition of the Organic Law of the Territory above cited.

There was no error in the ruling of the Circuit Judge. The exception is overruled.

J. A. Magoon and *J. Lightfoot* for the plaintiff.

Lorrin Andrews and *Wm. S. Fleming*, for defendant *C. Ding Sing*.

WILLIAM LONO AUSTIN v. R. WILLIAM HOLT, ANNIE HARRIS, ELIZABETH K. RICHARDSON and E. V. RICHARDSON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT

JOHN D. HOLT, Jr., v. WILLIAM LONO AUSTIN.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 12, 1903. DECIDED FEBRUARY 19, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A gratuity made a charge on real estate by will is taken subject to the payment of the debts against the estate. If the entire estate is consumed in paying debts the beneficiary takes nothing.

Where a legatee files a bill in equity to enforce a trust against property conveyed by the devisee without authority from the probate court and it is answered that the property was sold for its full value and the entire proceeds delivered to the administrator and consumed in paying the debts of the estate, it is error to exclude testimony offered to sustain such defense.

OPINION OF THE COURT BY GALBRAITH, J.

This is a bill to declare a trust and to enforce a charge on real estate. It is alleged that Eliza Wood Holt, the guardian and foster-mother of the plaintiff, died in the month of December,

1891, leaving a will by which she devised all of her property to her husband, Robert William Holt, and his heirs and assigns forever subject to a charge created as follows: "I hereby charge my estate with the payment of the sum of twenty-five dollars per month for the board, maintenance and education of William Lono Austin during his minority, and the payment thereof to be continued thereafter during the term of his natural life." That the will was duly admitted to probate, February 9, 1892, and Bruce Cartwright was appointed and qualified as administrator and acted as such until his discharge on October 23, 1893; that the entire estate consisted of real estate and there were several thousand dollars of debts due from the estate; that the administrator sold some of the real estate under order of court and applied the proceeds on the indebtedness; that one tract was sold to the defendant John D. Holt, Jr., by the devisee for the sum of six thousand dollars and the proceeds applied by the administrator on the debts; that another tract was also sold by the devisee to the defendant Elizabeth K. Richardson (Holt) for one thousand dollars and another to Annie Harris for three hundred dollars, setting out specific description of each tract sold; that these sales made by the devisee were not authorized or confirmed by the probate court and that the property sold in each instance was worth considerably more than the price paid as above recited and that the plaintiff became of age October 6, 1899, and that no part of the legacy given him by the said will has been paid.

The prayer is that the three defendants may be decreed respectively to hold the property purchased in trust and under charge to pay the sum of twenty-five dollars per month during the term of plaintiff's natural life and that the defendants pay the plaintiff the sum of three thousand one hundred and twenty-five dollars, being the aggregate amount for the monthly payments to date under said charge and interest and costs and for general relief.

The defendant John D. Holt, Jr., filed a general demurrer to the bill. This being overruled, each of the defendants an-

swered, each claiming that they had paid full value for the property and had purchased in good faith and that the proceeds of each sale had been turned over to the administrator and had been used by him in paying the debts against the estate.

The Circuit Judge decreed that the property "described and heretofore conveyed by said R. William Holt to said John D. Holt, Jr., Elizabeth K. Richardson and Annie Harris, by separate deeds, duly executed, acknowledged and recorded, is now, and ever since the date of the said respective conveyances has been held by said John D. Holt, Jr., Elizabeth K. Richardson and Annie Harris, respectively, subject to the payment of and under charge to pay to said William Lono Austin the legacy mentioned in the will of Eliza Wood Holt. * * * * That said property is now under and subject to said charge to pay to said William Lono Austin the sum of thirty-four hundred and fifty dollars, being the aggregate of said monthly charges and legacy due to said plaintiff up to the date hereof, together with the sum of three thousand dollars, being the interest thereon, and also the sum of thirty-one dollars, costs of this suit, making a total of six thousand four hundred and eighty-one dollars." It was further decreed that the said purchasers "do forthwith pay to said William Lono Austin the said sum of six thousand four hundred and eighty four dollars." The remainder of the decree contains a description of the three tracts by metes and bounds.

All of the defendants appealed from this decree except John D. Holt, Jr., who sued out a writ of error, but all rely practically on the same ground of defense, namely, that the land sold for its full value and the proceeds were used in paying the debts of the estate and that no right of the legatee was invaded or injury done him by the proceedings complained of.

It is contended on behalf of the plaintiff that the will made this legacy a charge against the real estate; that the probate of the will was notice to every one of this charge; that while this lien might have been discharged by a sale made by the administrator under an order and subsequent confirmation of the pro-

bate court, it could not be discharged by a private sale by the devisee and that such a sale transferred the land to the purchasers subject to the charge in favor of the legatee.

This contention is in the main correct but it fails to take account of one vital principle, namely, that involved in the legal maxim that "a man must be just before he is generous." In other words, while the will made the claim of the legatee a charge on the real estate and his claim could not be discharged by a sale by the devisee alone still the payment of the legacy was upon the express condition created by law that the land was not required to pay the debts of the estate. The debts were a first charge against the land, as there was no personal property, and the legatee could have no interest in it until these were paid. The legatee is a volunteer and only claims a bounty for which he has paid nothing while the creditor may demand as a right that the property be sold and the proceeds applied in satisfaction of his debt. Section 1529, C.L.; *Hays v. Jackson*, 6 Mass. 148; *Wilkinson v. Leland*, 27 U. S. (2 Pet.) 627, 655; *Pullen v. Hutchins*, 67 N. C. 428.

There is no charge of fraud in any one of these transactions. Nor does it appear that the devisee derived any money or other thing of value to him personally from the estate. There was no personal property and it is claimed that the entire proceeds of the several sales of real estate were insufficient to pay the debts and that the devisee gave his personal note to the administrator for the balance amounting to several hundred dollars in order that the administration might be closed in October, 1893.

If the property was sold for its full value and the proceeds turned over to the administrator and consumed in paying debts due from the testatrix no wrong was done the plaintiff and he has no right to complain of the purchasers on account of the sales. In this view of the case it was of vital importance that the defendants should show that the property sold for its full value in each instance and that the money was paid to the administrator and consumed in paying the debts.

At the hearing considerable evidence was taken as to the value

of each tract of land at the date of sale but all this was later stricken out, leaving the record without any evidence on this question. The judge also denied the offer of proof made on behalf of Elizabeth K. Richardson and Annie Harris that the respective amounts paid by them was turned over to the administrator and used by him in paying the debts of the estate. These rulings, striking out the evidence of value and denying this offer of proof, were errors for which the decree must be vacated.

There is an additional reason why the decree should be reversed. Under the allegations of the bill there can be no personal liability on the part of the purchasers of the land and there could be no personal judgment against them, while the only liability of R. W. Holt, if any, was a personal liability. The personal judgment against the purchasers of the land was erroneous in any view of the case. *Hodges v. Phelps*, 65 Vt. 303; *Brown v. Knapp*, 79 N. Y. 136; *Wiggins v. Jackson*, 95 Ind. 201.

Objection was also made to the decree appealed from in that it is not in the form authorized by equity practice in this character of proceedings as there is no provision made for its enforcement. The usual form of decree in this kind of cause, in addition to some of the matters covered by this decree, is to order a sale of the premises against which the lien is established to satisfy the amount of the decree on condition that the amount is not paid within a stated time, in analogy to the foreclosure of a mortgage in equity. *Daly v. Wilkie*, 111 Ill. 382; *Chase v. Warner*, 106 Mich. 695; *Barfield v. Barfield*, 113 N. C. 230. This objection is probably well taken but we do not base our decision on it, nor do we pass upon the questions whether the prayer of the bill is broad enough to permit an amendment of the decree so as to give the relief that the plaintiff may be entitled to, if any, nor whether there is a misjoinder of parties defendant. These questions may all be satisfactorily settled in the trial court in the further proceedings in the cause to be had there.

The writ of error and the appeals should be sustained and the cause remanded to the Circuit Judge of the First Circuit, with direction to vacate the decree rendered therein and for such further proceedings as may be necessary and consistent with the foregoing opinion. It is so ordered.

C. F. Peterson and *T. McCants Stewart* for the plaintiff.

Robertson & Wilder for R. William Holt, Annie Harris, Elizabeth K. Richardson and E. V. Richardson.

Kinney, McClanahan & Cooper for John D. Holt, Jr.

JAMES N. K. KEOLA, DEPUTY ASSESSOR OF TAXES
FOR THE DISTRICT OF WAILUKU, MAUI, *v.* SOL-
OMON HALE.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED JANUARY 28, 1904. DECIDED FEBRUARY 19, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An assessor of taxes may sue for unpaid taxes assessed by his predecessor in office as well as for those assessed during his incumbency.

Assessment books or tax rolls are admissible in evidence in support of an assessor's claim for delinquent taxes assessed prior to the plaintiff's incumbency.

An action of assumpsit for delinquent taxes may be brought by an assessor or deputy assessor in his own name on behalf of the Territory of Hawaii. In the declaration and summons in this case it sufficiently appears that the action is so brought.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit, commenced in the District Court of Wailuku, for \$192.78 for taxes assessed against the defendant for the years 1895, 1896, 1897, 1898, 1899, 1900 and 1901. The Circuit Court, jury waived, and also the District Court, rendered judgment for the plaintiff for the amount claimed. The three questions raised by the exceptions will be briefly referred to.

The plaintiff has held his present office only since November 1, 1900. One question is whether he can recover of the defendant any taxes other than those assessed during his incumbency. Whatever doubts may have existed on this subject prior to 1896, were disposed of by Act 51 of the Laws of the Session of that year. Section 43 of that Act (C.L., Sec. 846) provides that "the successor of any assessor or deputy assessor shall be vested with the same power and be subject to the same duties and liabilities as his predecessor, and shall collect all taxes then unpaid, and shall carry on any proceedings commenced by his predecessor." "All taxes then unpaid" is a phrase too clear to need definition or explanation.

Another question is whether the tax books or assessment rolls were correctly admitted in evidence in support of the plaintiff's case. Section 86 of the Act of 1896 (C.L., Section 889) answers this in the affirmative. That section reads: "The assessment or tax lists; tax books and copies thereof and delinquent lists showing unpaid taxes assessed against any person or property, shall be *prima facie* proof of the assessment of the property and person assessed, the amount of taxes due and unpaid and the delinquency in payment, and that all forms of law in relation to the assessment and levy of such taxes have been complied with."

The third question is whether the plaintiff can recover at all, the contention of the defendant being that the debt is due to the Government and not to Mr. Keola, either in his individual or in his official capacity. Section 59 of the Act already re-

ferred to (C.L., Sec. 862) provides that, "If any tax be unpaid when due, the assessor may proceed to enforce the payment of the same, with all penalties as follows: * * * (2) By suit or action in assumpsit, in his own name, on behalf of the Republic of Hawaii". See also C. L., §859. By Section 40 (C. L., Sec. 843) deputy assessors are given, with exceptions not material in this case, the same power and authority possessed by the assessor. This action was brought by the plaintiff as "deputy assessor of taxes in and for the District of Wailuku, Maui, Second Taxation Division of the Territory of Hawaii," and the main allegation of the declaration or summons is, "that said defendant, Solomon Hale, is lawfully indebted to the plaintiff, in his official capacity as assessor in the sum of * * * for taxes assessed against the person and property of said defendant * * * on the books of the Assessor of Taxes for the District of Wailuku, Island of Maui, for the year * * * ." In our opinion the declaration sufficiently shows that the action was brought on behalf of the Territory of Hawaii. Its language cannot be construed otherwise. The action as brought is authorized by the statute.

The exceptions are overruled.

Attorney General L. Andrews and *N. W. Aluli* for plaintiff.

Creighton & Correa for defendant.

KALA v. HARRY T. MILLS.**EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.****SUBMITTED JANUARY 25, 1904. DECIDED FEBRUARY 20, 1904.****FREAR, C.J., GALBRAITH AND PERRY, JJ.**

The appellant's note of appeal and appeal bond to the Circuit Court or Judge control the Magistrate's certificate of appeal in case of an inconsistency.

An appeal to a "circuit court, general appeal, in chambers" is an appeal to a Circuit Judge at Chambers and should not be dismissed for uncertainty.

OPINION OF THE COURT BY FREAR, C.J.

The defendant noted an appeal from a judgment of the District Court of South Kona to the "Circuit Court, 3rd Circuit, Territory of Hawaii. General Appeal. In Chambers." His appeal bond, which was for \$20, recited that he had appealed to the "Circuit Court of the Third Circuit, Territory of Hawaii, in Chambers." But the Magistrate's certificate of appeal stated that the appeal was to the "Circuit Court of the Third Judicial Circuit, Territory of Hawaii." The Circuit Court dismissed the appeal on the ground that it was "impossible to accurately determine which of the three remedies given by statute this defendant desires to avail himself of." The defendant took an exception.

The Magistrate's certificate was clear to the effect that the appeal was to the Circuit Court, that is, a general appeal involving a jury trial, but that is inconsistent with the defendant's note of appeal and bond and is not required by any statute or

rule of court. It cannot control the note of appeal and bond. These both show an intention to take a general appeal to be tried at chambers. If they had stated that the appeal was to the Circuit Judge instead of to the Circuit Court in chambers, there would be no doubt whatever. The question is whether using the word "court" instead of "judge" was fatal. It is evident that the appeal intended was not to the Circuit Court with a jury, or to the Circuit Court without a jury, or to the Circuit Court on points of law, and of course it was not to the Supreme Court on points of law. If it was a valid appeal at all, it was to the Circuit Judge at chambers. Are the words "general appeal" and "in chambers" sufficient to justify holding that the appeal was a general appeal to the Circuit Judge at chambers, notwithstanding the use of the words "circuit court" instead of "circuit judge"? In our opinion, they are. Indeed, the usual title of petitions and processes and other papers before Circuit Judges at chambers is "In the Circuit Court of the Circuit, at Chambers." Doubtless the words "circuit judge" are the more usual and appropriate in the body of papers and should be used in order to avoid confusion and doubt, but the use of the words "circuit court in chambers" is not fatal.

The Circuit Court therefore was without jurisdiction to dismiss the appeal, for it was taken to the circuit judge at chambers. Accordingly, following the course pursued in *Silva v. Souza*, 14 Haw. 46, the exception is sustained and the case remanded to the Circuit Judge for such further proceedings as may be proper and consistent with this opinion.

J. L. Kaulukou for plaintiff.

J. A. Magoon and *J. Lightfoot* for defendant.

HENRY J. LYMAN, NORMAN LYMAN, EUGENE LYMAN and RICHARD LYMAN, PARTNERS, doing Business as the CENTRAL MEAT MARKET, v. F. L. WINTER, DEFENDANT, and A. E. SUTTON and H. VICARS, PARTNERS, under the Name of A. E. SUTTON & CO., GARNISHEES.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED FEBRUARY 3, 1904. DECIDED FEBRUARY 20, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A District Magistrate may, in a proper case, set aside his own judgment and reopen the case for further hearing.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$78.95, instituted in the District Court of South Hilo, Hawaii. Summons was issued on September 13, 1902, returnable on September 16, 1902, at 10 A. M. The defendant not being found, substituted service was made on the day of issuance, or attempted, by leaving a copy, etc., with his wife at his last and usual place of abode. On the morning of September 15, one of the members of the firm of Ridgway & Ridgway, attorneys, informed the District Magistrate, in court, that his firm would appear for the defendant upon the calling of the case. On the return day, at the appointed hour, counsel for the plaintiff, although informed by the Court and the clerk of the intended appearance of counsel for the defendant, moved for trial and such trial was thereupon

had, *ex parte* so far as the defendant was concerned. H. Vicars, one of the garnishees, appeared and testified. Judgment was rendered for the plaintiffs for the amount claimed. The usual order in that Court, of hearing criminal cases first, was not followed on that occasion and an unfinished criminal case, set for that hour, was passed for the time being in order to permit of an immediate trial in the case at bar. At 10:12 A. M., Messrs. Ridgway & Ridgway appeared and orally moved to set aside the default and judgment and to re-open the case. The motion was denied. Three days later, similar motions by the defendant and by the garnishees were presented and denied, the ground alleged being insufficiency of service and irregularities in the obtaining of the judgment. On the 20th the garnishees appealed from the judgment (evidently that on the merits) to the Circuit Judge at Chambers, but their appeal was, on October 8, dismissed on the ground that the statute purporting to confer the right thereto was unconstitutional. In his written opinion on this matter, the judge commented adversely on the methods that had been followed in obtaining judgment and remarked, in effect, that the motion to set aside the same should have been granted. On the following day the garnishees filed before the Magistrate a second motion to set aside the judgment, based upon the same grounds and upon the additional grounds that the judgment was against the law and the evidence and that the garnishees had no money or other property of the defendant in their hands at the time of service of summons. This motion was granted on October 29, the ground stated by the Magistrate being that the Circuit Judge had in his decision of September 20 directed that the case be re-opened. From this ruling the plaintiffs appealed to the Circuit Court, jury waived, on the points of law, (a) that the Court erred in granting the motion because an earlier motion to the same effect had been denied and the matter was *res judicata*, (b) because the Magistrate misconceived the intent and effect of the remarks of the Circuit Judge above referred to, and (c) because the District Court, being of limited jurisdiction, had no authority to set aside its own judg-

ment and grant a new trial. The Circuit Court dismissed the appeal, on the ground that it was not a final order, and remanded the case to the District Court for further proceedings. The plaintiff's bill of exceptions presents the question of the correctness of this last mentioned ruling of the Circuit Judge.

The mere fact that the District Court had denied one or more motions to re-open would not preclude it from granting still another motion to the same effect, provided only that it had the power under any circumstances to set aside its own judgment and to re-open the case. If it had the power, it could exercise it even of its own motion, if satisfied that the ends of justice so required.

The District Court ruling appealed from is interlocutory and therefore not appealable if that court had authority to make it. In our opinion, District Magistrates have, under our laws, power to set aside their own unsatisfied judgments and to re-open cases before they have been removed by appeal or otherwise to another Court whenever, in their discretion, the ends of justice require that this be done. Whatever the rule may be elsewhere as to police or justices' courts, our district courts have long exercised the power and the practice not only has been unquestioned but has been recognized by the Supreme Court. See *The King v. Yok Lan*, 7 Haw. 854, where the court, composed of five judges, said that "if the defendant", who had been sentenced upon a plea of guilty and whose motion to have the judgment set aside and the case reheard had been denied by the police justice, "thought the police justice was wrong in refusing the application for a rehearing of the case, he should have appealed from that decision and not from the judgment in the case." The exercise of this power is sometimes necessary in order that mistakes may be corrected and in order that the determination of the controversy may be a just one. Irregularities in obtaining a judgment constitute good ground for setting it aside and permitting further hearing.

In *Gouveia v. Nakamura*, 13 Haw 450, 452, we held that a district magistrate erred in not granting a motion to vacate a

judgment, the ground of the motion being that the judgment was void for certain stated reasons, and remanded the case with directions to have the judgment set aside.

Whether the district court misconceived the intent and the effect of the remarks of the Circuit Judge in his decision of September 20, or whether for any other reason the ruling of the magistrate should be sustained, we need not say. These are questions which could be determined only if we were at liberty to consider the appeal on its merits.

Counsel for the plaintiffs have, in this Court, referred to the ruling of the district magistrate as though it were an order for a new trial. While the order as stated in the certificate of appeal prepared by counsel for the appellants would seem to have been to that effect, yet upon an examination of the whole record we think the intention of the Magistrate was simply to order a re-opening for the admission of further testimony. In none of their motions did the present appellees ask for a new trial.

In our opinion the ruling appealed from is interlocutory and not appealable. The exceptions are overruled.

Smith & Parsons for plaintiffs.

Ridgway & Ridgway and *T. I. Dillon* for defendants and garnishees.

MAHIKI K. FERREIRA v. JOHN FERREIRA.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

SUBMITTED FEBRUARY 9, 1904. DECIDED FEBRUARY 20, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A trial judge cannot be said to have erred in refusing to determine the amount of temporary alimony to be paid by the husband, libellee, or in denying a motion for such alimony, where the only showing in support of such motion is an averment in the libel that the libellee "is possessed of large property besides enjoying a good salary" and the fact that shortly after the institution of the proceedings the libellee, in consideration of the libellant's agreement to an early hearing on the merits, agreed by written stipulation to pay her the sum of ten dollars per week as temporary alimony.

OPINION OF THE COURT BY PERRY, J.

This is a proceeding for divorce, instituted before the Circuit Judge under the Act of 1903, on June 3 of that year. On June 10 the parties filed a stipulation whereby the libellee agreed to pay forthwith into Court the sum of twenty-two dollars for costs, the sum of ten dollars per week from that date until the final disposition of the case on its merits as temporary alimony and such sum as might be reasonably required to meet the expenses of the libellant's expected confinement, she being then *enceinte*, and whereby it was further agreed that the case be heard on its merits on "June 20, 1903, or as soon thereafter as the Court is at liberty to hear the same". On June 18, the libellee having then paid the amount named for costs and also two weekly installments of alimony, the libellant filed a motion to

the effect that the hearing be continued until at least four weeks after her confinement. Two days later the libellee moved that he be permitted to withdraw from the stipulation above mentioned, on the ground that the libellant had violated its terms by asking for a continuance beyond June 20. After hearing testimony as to the understanding between counsel concerning the time of hearing, the judge denied the libellee's motion, granted that of the libellant and ordered libellee to pay into Court, on the day preceding the hearing, the sum of thirteen dollars for libellant's use for witness fees.

On July 31, libellant filed a motion for an order requiring libellee to pay "a certain definite sum per week for the maintenance and support of your petitioner," *pendente lite*, and other sums for witness fees and other expenses of trial and for expenses of her confinement. At the hearing of the motion, the libellant asked for leave to amend it by adding the words, "This motion is based on all the papers and files on record in this case, to-wit, Ferreira v. Ferreira, Libel for Divorce". The Court disallowed the amendment and dismissed the motion, saying that "when motions for alimony are presented to the Court, they should be based upon affidavits to be filed with the Court, setting forth the financial standing of the libellee, in order that the Court may be guided thereby in setting the amount of the alimony, etc. That has not been done in this case." It is from this order of disallowance and dismissal that the present appeal is taken. The trial on the merits has not been had.

Whether or not the order appealed from is appealable, need not be determined. Assuming that it is, we cannot say that the Circuit Judge erred in making the ruling and order complained of. The error, if any, in the disallowance of the proposed amendment was not prejudicial. If the motion was in fact based solely on the records and could properly be so supported, the failure to so state in the motion itself could not affect the merits of the motion. The latter would, in that event, be granted or refused according to the showing made by the record. There was nothing, however, in the record or otherwise before

the Court tending to show what property the libellee owned or what his income was, other than an averment in the libel that he "is possessed of large property, besides enjoying a good salary as manager of the Bismark Stables at said Wailuku" and the fact that the libellee had by the stipulation of June 10, 1903, agreed to pay ten dollars per week for his wife's support, although, it may be added, the consent to pay as much as the sum named may have been due, as was contended in the lower court, to the agreement of the libellant for an early hearing. No affidavits were filed and no evidence adduced or offered on the subject. While the Court might, perhaps, have been justified upon the slight showing found in the record in awarding a small weekly allowance as alimony, still it cannot be said to have erred in refusing to determine the amount of such allowance in the absence of more satisfactory evidence of the libellee's financial ability. The libellant should have complied with the reasonable suggestion of the trial court that a further showing be made.

The appeal is dismissed.

Vivas & Bitting for libellant.

J. L. Coke and *D. H. Case* for libellee.

CONCURRING OPINION OF GALBRAITH, J.

I concur in the judgment of dismissal in the above case for the reason that, in my opinion, the order appealed from was clearly interlocutory and not a final and appealable order under the statute.

F. H. REDWARD v. J. O. LUTTED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED FEBRUARY 13, 1904. DECIDED FEBRUARY 20, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The evidence in this case is held sufficient to sustain a finding that there was no express contract for moving a house for a less sum than that sued for on a *quantum meruit*.

OPINION OF THE COURT BY FREAR, C.J.

Assumpsit for \$281.49 for moving a house. Defense that there was an express contract for \$150. The District Magistrate so found, but on appeal the Circuit Court, jury waived, found for the full amount claimed. The question now raised by the exceptions is whether there was sufficient evidence to sustain the finding. It is probably true, as contended for the defendant, that when he testified that there was no contract, he meant no written contract and not no oral contract for \$150, but, although he, the defendant, contends that there was an oral contract for \$150 the plaintiff testified positively that there was no contract at all, but merely an offhand rough estimate or guess as to the probable cost of moving the building, before the defendant purchased it or engaged the plaintiff to move it.

The exceptions are overruled.

W. T. Rawlins for plaintiff.

Andrews & Andrade for defendant.

GEORGE MUNDON v. S. K. KAE0.**APPEAL FROM DISTRICT COURT, LIHUE.**

SUBMITTED NOVEMBER 12, 1903. DECIDED MARCH 2, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

OPINION OF THE COURT BY GALBRAITH, J.

An appeal from a District Magistrate to this Court on points of law, alleging error in excluding testimony, the record being silent and not sustaining the point, presents no question of law for decision.

Assumpsit before the District Magistrate, at Lihue, Island of Kauai, for balance claimed on account for lumber and material sold and delivered by the plaintiff to the defendant. Judgment was rendered for the plaintiff in the sum of \$300.00, attorneys' commission and costs of court.

The defendant appealed to this court on points of law. Three points were set out in the certificate, but two of these are abandoned and the point relied on is that the Magistrate erred in refusing to permit the defendant's witness, T. Onokea, to testify.

The transcript of the evidence shows that Tom Onokea testified as a witness in the case but whether T. Onokea and Tom Onokea are one and the same person is not disclosed. It does not appear from the transcript or otherwise that any testimony was offered and rejected or that any witness was denied the privilege of testifying on behalf of the defendant. If there was any error of this character committed by the Magistrate, during the course of the trial, there is no evidence of it in the record. No question of law is presented by this point.

We have searched the record in vain for some plausible ground for this appeal and are forced to the conclusion that no meritorious excuse is presented for the presence of this case in this Court at this time.

The appeal is dismissed and the cause is remanded to the District Magistrate for such further proceedings as may be necessary.

John D. Willard and Chas. F. Peterson for the plaintiff.

S. K. Kaeo, in person, and *A. G. Correa* of counsel.

JAN BAN *v.* TSEN YIM, TSEN KUI, TSEN NGAN and
TSEN SHOON, Partners, under the name of Wo Yick.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED FEBRUARY 1, 1904.

DECIDED MARCH 2, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An action may be maintained on an original partnership indebtedness notwithstanding that one of the partners after buying out the others has given a note for the antecedent debt, unless all the parties to both obligations agreed that the note should operate as an extinguishment of the antecedent debt.

The evidence in this case is held insufficient to require as a matter of law a finding that a novation was effected by the assent of all the parties interested.

OPINION OF THE COURT BY FREAR, C.J.

Assumpsit for \$172, balance of a loan of \$300 to the defendant partners. After they had paid \$28 the defendant Tsen Yim bought out the other partners and continued to conduct the bus-

iness alone. He gave a note for the balance, \$272, after which two payments of \$50 each were made, leaving the \$172 now sued for unpaid.

The question is whether the note given by Tsen Yim was in full settlement of the preceding partnership indebtedness so as to preclude an action against the partners on the original debt. That would be the result if all parties to both obligations so understood and assented thereto. But the mere giving of a note for the balance of an antecedent indebtedness, even though the new arrangement involved different parties as well as a different obligation, would not of itself operate as a novation so as to extinguish the original indebtedness. The new obligation would be considered as a substitute for the old on condition that it should be performed. It is generally held that the burden rests on the party relying on a novation under circumstances like these to prove it. Just how much evidence is required is a matter of some difference of opinion. Under the circumstances of this case probably comparatively slight evidence would be sufficient. It seems that the plaintiff testified, among other things, that "Tsen Yim assumed the business, admitted the debt and promised to pay \$272. He promised to pay and I accepted his responsibility for the amount." Whether the Magistrate ought, in our opinion, to have found as a matter of fact from this that there was a complete novation we need not say. The case is before us solely on the question of law as to whether he was obliged to so find as a matter of law. In our opinion, the testimony quoted was insufficient to require him as a matter of law to find that there was a novation. If a review of the findings of fact were desired, the appeal should have been to the Circuit Court.

The judgment appealed from is affirmed.

Robertson & Wilder and *F. M. Brooks* for plaintiff.

C. W. Ashford for defendants Tsen Yim and Tsen Kui.

IN THE MATTER OF THE WILL OF CHARLES NOT-
LEY, Deceased.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JULY 29, 1903.

DECIDED MARCH 8, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In deciding the question whether there is sufficient evidence of undue influence in the making of a will to go to the jury, the evidence must be considered in the light most favorable to the contestants; the proponents must be considered as admitting not only the facts which the contestants' evidence tends to establish but also every inference which a jury might fairly draw from such evidence; in order to justify the direction of a verdict for the proponents, there must be such insufficiency of evidence in fact as to amount to insufficiency in law; there must be an absence of material and substantial evidence, which, if believed by the jury, would in law justify a verdict for the contestants; the question is not whether the evidence shows in the opinion of the court that the will was procured by undue influence but whether it was such that the jury could reasonably have so found.

Although in order to set aside a will on the ground of undue influence, it must be proved that such influence operated at the very time of making the will, this may be shown by indirect or circumstantial evidence, but in such case the evidence must be of a very clear and convincing character.

The subsequent execution of a codicil, when such influence is not operative, expressly confirming the will, makes it immaterial that the will itself was procured by undue influence, if such were the fact.

Undue influence which will vitiate a will is distinguishable from mere influence and from mere bad influence. It must amount to fraud or coercion, or the substitution of another's will for that of the testator.

Where it was contended by the wife and children that the will and codicils of the husband and father were procured by the undue influence of a niece who had been brought up in the family as a daughter but where there was no direct evidence of even an attempt to influence the testator, whether duly or unduly, in the making of his will or codicils, and uncontradicted affirmative evidence that she was not present at the execution of the will or either codicil, and the uncontradicted evidence showed that the testator was of sound and strong mind, and the evidence, although it showed that there had been more or less friction in the family due in part at least to the presence and conduct of the niece and that the uncle and niece were very fond of each other and possibly that the latter had the disposition and opportunity to attempt to influence the former in the disposition of his property, yet did not show that she had a general controlling influence over him, and the will itself was not unnatural and its provisions were fully accounted for on other grounds than the undue influence of the niece, it was not error to direct a verdict for the proponents.

A testator may make even what is sometimes called an unnatural will if he does so freely and with a sound mind, but in this case the will was not of that character.

Mere suspicion or conjecture of undue influence is insufficient to justify nullifying an exercise of one's right to dispose of his property by will.

OPINION OF THE COURT BY FREAR, C. J.

(Galbraith, J., dissenting.)

The Circuit Judge, after a hearing, admitted to probate the will and codicils of the decedent, Charles Notley. The contestants, his widow and four children, Charles, William, Maria and David, appealed to the Circuit Court, and the case was there tried before a jury and a different Circuit Judge on the issue of undue influence by the decedent's niece, Mrs. Emma Danford, née Mullinger. At the close of the contestants' case, the proponents moved the Court to direct a verdict in their favor. This motion was granted and a verdict was rendered as directed. The question now raised by the contestants' exceptions is whether there was sufficient evidence of undue influence to go to the jury.

Mr. Notley had lived on the island of Hawaii half a century. He successively herded sheep, kept a store and tannery and cultivated sugar cane, and finally his property became of considerable value. He early took an Hawaiian wife, by whom he had a number of children, of whom four survived him. In 1885 he visited England, his native land, and brought back with him his niece, Emma Mullinger, then a child of about thirteen years, whom he brought up as a daughter. In October, 1898, Emma married and moved to Honolulu. The will was executed May 18, 1899; the first codicil, August 2, 1900; and the third codicil April 11, 1902. Mr. Notley died May 2, 1902.

The will gave \$1000 to a Miss Barnard, who had lived at the Notley home for a time; \$500 to the decedent's brother in England, with a gift of the same by way of substitution to the brother's wife and granddaughter successively; \$500 to Emma Mullinger's father in England; the homestead, furniture, etc., on Hawaii to decedent's son David; the proceeds of an insurance policy in equal shares to his wife, his children, William, Maria and David, and his niece Emma; the residue of the estate to the executors in trust to pay the income thereof in equal parts to the wife, the said three children and Emma respectively, for their lives, and the children of the remaining son Charles, with various provisions by way of substitution, remainder, payment to the children of Charles upon their arrival at certain ages, freedom from the control of their husbands in the cases of Maria and Emma, etc., and finally, on the termination of all the life estates, the corpus was to be divided equally among the heirs of the three children, the niece and the children of the remaining son Charles. Thos. R. Walker and Anthony Lydgate were appointed executors and trustees. The first codicil substituted Cecil Brown as executor and trustee in place of Mr. Walker, who had left the Territory, and expressly confirmed the will in all other respects. The second codicil gave the homestead, furniture, etc., to Emma in place of David, with a proviso that the wife should have the use of a cottage on the premises, with its

furniture, for life, and expressly confirmed the will in other respects.

The features that are most objected to are that the niece, subject to certain conditions in favor of the wife, instead of the wife, was given the homestead, and that Charles' children, instead of himself, were given most of what would have been given to him if he had been treated like the other children and the niece. The wife, of course, was not bound by the provisions of the will and has in fact elected to take her dower instead, and does not join in this appeal.

The estate is valued at about \$400,000 and the contest has been strenuous. The trial judge at the outset adopted the view of the contestants, which is doubtless the correct view, that great latitude should be allowed in the introduction of evidence in a case of this kind, and was extremely liberal throughout in allowing them to introduce evidence that of itself seemed trivial or irrelevant—on the possibility that its relevancy or materiality might eventually be shown by other evidence, or that the evidence might be sufficient as a whole to go to the jury, however weak in its several parts. Counsel for the contestants have in their arguments and briefs made the most of such evidence as they were able to produce. But after examining the lengthy transcript we are unable to find that the trial judge erred in directing a verdict for the proponents.

There is no doubt that in deciding the question whether there was sufficient evidence of undue influence to go to the jury, the evidence must be considered in the light most favorable to the contestants; that the proponents must be considered as admitting not only the facts which the contestants' evidence tends to establish, but also every inference which a jury might fairly draw from such evidence; that in order to justify the direction of a verdict for the proponents there must be such insufficiency of evidence in fact as to amount to insufficiency in law; that there must be an absence of material and substantial evidence, which, if believed by the jury, would in law justify a verdict for the contestants; that the question is not whether the evi-

dence shows in our opinion that the will and codicils were procured by undue influence, but whether it was such that the jury could reasonably have so found.

There is no direct evidence whatever that Emma ever attempted to influence, whether duly or unduly, Mr. Notley in the matter of his will. The only evidence of anything that ever passed between them on that subject is found in the testimony of his son Charles, to the effect that at the trial before the Circuit Judge Emma testified that she had no knowledge of any will being made, but that she later altered that by stating that Mr. Notley had told her that she was going to have the homestead and that she had replied "Thank you, uncle; I love the dear old place."

The will was executed at the office of Mr. Notley's attorney in Honolulu. The instructions as to its provisions were given to the attorney there. Emma was not present on either occasion. It may be that, as the contestants contend, he was then visiting at her home, though there is not any direct evidence as to that. After her marriage, he sometimes visited her and sometimes his daughter Maria, when he came to Honolulu. The will apparently differed from a former will in the one respect that the son Charles' children were substituted for him. The first codicil, substituting Mr. Brown for Mr. Walker as executor and trustee, and expressly ratifying the will, was executed on the island of Hawaii at a time when Emma was living with her husband on the island of Kauai. It was prepared by the attorney at Mr. Notley's request made by letter, though he had spoken about it before, and was sent to Mr. Notley who sent it back to the attorney for keeping after its execution. The second codicil, substituting Emma and the wife for the son David as to the homestead, was executed when Mr. Notley was visiting Emma. It was drafted from instructions given by Mr. Notley alone at the attorney's office, but was executed at Emma's home at the suggestion of the attorney, that he, the attorney, bring the codicil to the house for execution, because at that time exertion on the part of Mr. Notley brought on spells of coughing.

The attorney had never met Emma, excepting perhaps once casually a week or so before. Emma was not present at the execution, but brought pen and ink at Mr. Notley's request and then withdrew. Mr. Notley's wife also was staying with him at Emma's home at that time. Mr. Notley was evidently very careful in money and property matters and executed the will and codicils, as the evidence shows, only after giving them very careful consideration.

There being no direct evidence that the niece ever had anything to do with the making of the will or codicils even by way of suggestion, the contestants endeavor to show that Emma had had an unbroken, profound, dominating influence over Mr. Notley ever since he met her, and that that influence was of an evil and unnatural character, or, to state their contention in another way, that she had the power to influence Mr. Notley generally; that such influence being evil, in that it was exerted, as contended, in creating family dissensions and depriving the wife and children of natural rights, the presumption is against the rightness of her motives; that she showed a desire to influence the decedent in the matter of his will by threatening to Charles to do so in certain particulars; that she had opportunities to do so; and that the will itself shows that she accomplished her purpose.

There is no doubt, as was said in *Herster v. Herster*, 122 Pa. St. 252, quoting from an earlier case, "that the undue influence must be proved to have operated as a present constraint at the very time of making the will," and of course if either codicil was executed in the absence of such influence, it would be immaterial that the will itself had been executed under such influence, if such were the fact, for in such case the execution of the codicil would amount to a reexecution of the will at a time when the undue influence was not present. Underhill, Wills, Sec. 216. And yet direct evidence of such influence at the precise time of execution is not indispensable. That may be shown by circumstantial evidence. Mental weakness on the part of the testator and general control over him, and desire

and opportunity to control him in the disposition of his property by will may be shown—but only in so far as it tends to show that undue influence was in fact operative at the time of the execution, and in such cases the indirect evidence must be of a clear and convincing character; indeed, it is said that it must be not merely consistent with the theory of undue influence, but inconsistent with a contrary theory. Mere suspicion and conjecture are not enough. *Boyse v. Rossborough*, 6 H. L. Cas. 2, 50; *In re Langford*, 108 Cal. 608, 622; *Boggs v. Boggs*, 62 Neb. 274, 285; *Maynard v. Vinton*, 59 Mich. 139, 153; *Schuchhardt v. Schuchhardt*, 62 N. J. Eq. 710, 713; *Beyer v. LeFevre*, 186 U. S. 114, 126.

The question of the mental and even the physical condition or capacity of the testator is a most important one in cases of this kind. What will control one person's mind will not control another's. The question is whether the testator was in fact controlled by another in the making of his will. Any amount of evidence of desire and opportunity alone to exert influence will fall short of proof that the will was the result of undue influence. The question is whether the exertions, if there were any, were undue and effectual. A person of proper age and sound mind has a right subject to a few statutory limitations, to dispose of his property by will as well as by conveyance, and he should not be deprived of that important right by the acts of others through evidence adduced when he is gone and cannot be heard, unless the evidence clearly shows that his volition was in fact overcome by that of others. As is said in Redfield on Wills, p. 518, "these questions (of undue influence) will not be likely to arise, except in regard to persons, naturally of weak minds, or facile dispositions, or where such has become their condition, either from age or disease." And in nearly all the cases in which wills have been set aside on the ground of undue influence, the mental weakness of the testator has been an important element. In the present case not only was there abundant evidence that the deceased was of strong and sound mind and body, but this was uncontradicted. For instance, Dr. Her-

bert, his physician, who had known him eighteen years, testified that Mr. Notley "was peculiarly strong in his character; he was firm; he was a man who would impress you as not easily influenced by any one * * * he was a strong character * * * He was a strong man and not a weak man mentally and physically. * * * His mental condition during the six months preceding his death was exactly as it was during his previous life, clear and intelligent." Mr. Cecil Brown, his attorney, testified that he was as honest a man as ever walked this earth, a warm-hearted, kind-hearted man, just as sound as you or I, that he showed no indication of failing intellect, and had always been the same; that his illness, when he executed the second codicil, did not affect his mind in the least,—only when he walked too much it brought on fits of coughing.

Thus there is no direct evidence of any attempt at influence, not to mention undue influence, as to the making of the will or either codicil, but, besides the ordinary presumption against undue influence, there is in this case a very great improbability that any such attempt, if it had been made, would have met with success, considering the strength and soundness of the decedent, both mentally and physically. We now come to the question of undue influence itself. This must be distinguished, in the first place, from mere influence. The exercise of mere influence on a testator, even if it should be successful in leading him to make a will which he would not otherwise make, would not necessarily justify setting the will aside. Everyone is subject to influences. Ordinarily a person has a right to dispose of his property by will. If he complies with the statutory requirements, what purports to be his will cannot be set aside unless it is shown not to be his will. This may be made to appear either by showing that the person had not sufficient mind to make a will at all, or by showing that his volition was overcome to such an extent that what purports to be his will was not his will but another's. There must be fraud or coercion. *Boyse v. Rossborough, supra*. The testator must have been deceived or forced into doing what he would not otherwise have done.

"The undue influence for which a will or deed will be annulled must be such as, that the party making it has no free will, but stands *in vinculis*. It must amount to force or coercion, destroying free agency." *Conley v. Nailor*, 118 U. S. 127, 136. The following from 1 Underhill, Wills, Sec. 144, is amply sustained by the cases:

"Every influence which is brought to bear by a legatee upon the mind of the testator, by means of which the former secures a benefit, is not necessarily undue. The employment of argument or persuasion, directed to the understanding; of flattery, addressed to the feeling of self-esteem, or of appeals to the affection or pity of the testator, will not constitute undue influence sufficient to vitiate a will which, upon the whole, appears to be the outcome of the free agency of the testator. Honest intercession and solicitation, though insistent and continuous during the period covering the execution of the will, if they do not result in coercing the testator into making a will which he would not have made voluntarily, are not undue influence. It is only when such pressure results in subverting the will of the testator to that of another that it is undue influence. Neither advice nor argument nor persuasion would vitiate a will made freely and from conviction, though the will might not have been made but for such advice and persuasion. Gratitude and affection growing out of benefits conferred or being conferred; esteem and friendship, the result of admiration for another's character, are allowed to have their proper operation upon the mind and volition of the testator. He has a right to keep his mind and heart open to the sweet influences of social ties and to the promptings of the natural love which he may have for those of his own blood. On the other hand, he has a right to listen to the suggestions and solicitations of persons not of his kindred, which have for their object the procurement of testamentary benefits at his hands. He may lawfully permit himself to be influenced by motives of friendship; he has a right to remember the claims of those from whose hands he has received favors during his life-time; he may permit himself to be influenced by all those motives, or by requests based upon his gratitude for past benefits or present comforts enjoyed by him. His will should be sustained if, after listening to and deliberating upon the appeals and solicitations, his mind is free from restraint and coercion, and he is at liberty to act freely upon them, to-

acquiesce in or to reject them, and his will, when it is executed, speaks his own mind and intention, voluntarily formed, and not those of another person or persons."

In the recent case of *Naoiwi*, 14 Haw. 43, this Court approved a charge to the jury which contained the following:

"Procuring a will to be made, unless by foul means, is nothing against its validity. A man has a right by fair argument to induce another to make a will, and even to make it in his favor. A will procured by honest means, by acts of kindness, by attention and by importunate persuasion which delicate minds shrink from would not be set aside upon that ground alone. It is only that degree of influence which deprives a testator of his free agency and makes the will more the act of others than his own which will avoid it. Neither advice nor argument nor persuasion nor entreaty will vitiate a will made fairly and from conviction, though such will might not have been made but for such advice or persuasion. Undue influence is not such as arises from affection or esteem, but it must be the control of another will over that of the testator whose faculties have been so impaired as to submit to that control and to such extent that he has ceased to be a free agent and has quite succumbed to the controlling power of the mind or will. * * * Before this will can be set aside you must believe and find from the evidence that at the time of the execution of the will the mind of Nalimu Naoiwi was so under the control and influence of her husband D. Naoiwi, that she could not if she had wished have made a will different from this; you must believe that she had not sufficient strength of mind to resist such influence exerted by Naoiwi at the time of the execution of the will."

Undue influence in the law of wills must be distinguished likewise from what is commonly spoken of as bad influence.

"In a popular sense," it is said in *Boyse v. Rossborough*, *supra*, "we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a

will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man to so dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud."

The same is true in the case of a testator or grantor who, though having a wife and legitimate children living, has lived in illegal intercourse with another woman. The influence of such a woman, though extremely undue in one sense, is insufficient to vitiate a will or deed, in the absence of proof that the mind of the testator or grantor was overcome, although the deed or will would be more open to suspicion in such a case than in other cases. *Conley v. Nailor, supra*. Of course, we do not imply that the will and codicils in question were the results of either mere influence or bad influence. We are now merely pointing out the nature of undue influence.

Bearing in mind, then, that there is no direct evidence of even an attempt at influence in the making of the will and codicils, that the testator was of strong mind, and that influence, in order to vitiate a will, must be such as to overcome the will of the testator by fraud or coercion, what is the nature of the evidence relied on to show such influence? It would be impracticable to set forth all the evidence or the elaborate arguments which the reason and imagination of counsel have built upon it, and yet perhaps we should indicate its general nature. It is designed in general to establish Emma's alleged long continued and complete dominion over the decedent, and the evil, unnatural character of that influence.

According to Mr. Lydgate, who was perhaps the most reliable witness on these points, Mr. Notley was very strict with Emma and often sharply corrected her for not doing what he had told her to do and saw to it that she obeyed his commands and he apparently thought the Notleys were as much to blame as Emma for what trouble there was. But Mr. Lydgate was one of the proponent's witnesses. We are now concerned with the contest-

ants' evidence. There is no doubt that Mr. Notley and Emma were fond of each other and that there was more or less trouble in the family and that this was due in part to Emma's presence or attitude there. That that should be so to some extent is not altogether surprising, considering the differences in education and tastes between an English girl brought up in England and an Hawaiian and part Hawaiians brought up in Hawaii. Emma may have been somewhat "stuck up" and the others were more or less jealous of her. The evidence seems to indicate that the troubles were due quite as much to their attitude towards her as to her attitude towards them, perhaps more so. If the testimony of the contestants' witnesses is true, Emma said and did things at times that she certainly ought not to have said or done. That is true of some of the Notleys also. But that is not the question. The question is whether she had dominion over Mr. Notley. A large number of incidents were brought out in the evidence, and yet perhaps not so very many when we consider that they were spread over a period of seventeen years. Those who testified to these were chiefly the Notleys themselves. Neighbors in a country district and relatives do not seem to have known that things in the Notley family were in the horrible state claimed. Mrs. Notley herself, whose ill-treatment by Emma is contestants' main reliance, was not called as a witness. Some of the incidents were trifling and remote, some were entirely unconnected with Mr. Notley or, if connected with him, unconnected with Emma, some tended to show on cross-examination of the witnesses that Emma was not at fault and that she often failed in having her own way even when very insistent. She is assumed to have been to blame for everything that went wrong.

It is contended that the status was ideal in the family prior to Emma's advent, that upon her arrival there was a marked change, that she brought about an estrangement between Mr. Notley and his wife and children, usurped the wife's position as mistress of the household, and practically drove her and the children out, depriving them of vital rights and privileges. The

witnesses relied on chiefly to show that former conditions were ideal seemed to think not that they were unusually good, but that they were such as are found in ordinary happy families; they testified mostly in regard to a period some years before Emma's arrival and one of them said that there had been trouble once over some Portuguese girls who were treated more as guests than as servants. One of the evidences of the complete change was, as contended, that there was often evening singing in the family before but not after her arrival, and yet, when she arrived, William was confined to a cottage in the yard as a leper and not long after went to the leper settlement on Molokai where he has been ever since; David a few months after Emma's arrival went away to school in California, Emma herself having been away at school in Honolulu much of those few months; and Maria had married and left the home several years before. Charles and his wife, however, were there. It was Charles' wife who testified that the singing stopped, referring particularly to the first six months after Emma's arrival during much of which time Emma was away at school—and she says that she, the witness, did not then remain long in the parlor evenings because she had to go to her children. Emma's complete control was evident at the very beginning, it is contended, because Mr. Notley writing from England, spoke of her as "a very nice girl" and "crazy" to come with him even against the objections of her mother; and on their arrival from England he took her with his wife and daughters to a restaurant, and Emma whispered something to him, whereupon he asked for a clean tablecloth—which, as contended, he had never done before—and because the waiter would not bring one, he left and took the others elsewhere for lunch. It is true, as contended, that he was proud of his boys before and even adopted the name of "Chas. Notley & Sons" in his business, though apparently without giving them an interest in the business, but there is no lack of evidence that he was proud and fond of all his children up to the time of his death, except of Charles, whose own conduct gave ample cause, as he believed, for his displeasure, and he treated even Charles

almost munificently in a financial way and otherwise treated him kindly after he had disgraced his father's name, as Mr. Notley believed. This is shown by his affectionate letters, his gifts, his visiting them and having them visit him, and by the direct testimony of many of the contestants' witnesses. There was at times trouble between Mr. Notley and his wife, and the wife and Emma. It is contended that Emma practically displaced her. Mrs. Notley was an Hawaiian—a faithful, hard-working woman, but apparently incapable of rising with Mr. Notley's circumstances. She ate Hawaiian food mostly, sat on the floor, would not ride in a carriage, and did not learn English during forty-three years of married life with Mr. Notley. It is true she spent much of her time washing and ironing in an out-house after Emma's arrival,—but it is equally true that she did before that and after Emma left. She often, but not always, ate away from the family table after Emma came—especially when she ate Hawaiian food—which she usually ate, but she did this—doubtless not to the same extent—before Emma's arrival and after her departure. Emma was placed in charge, but not until seven years after her arrival, and long before her arrival the daughter Maria seems to have had special charge of the house while the wife did the washing, and after Emma left, after being in charge five years, the granddaughters, children of Charles, and not Mrs. Notley, were placed in charge, and, according to the testimony they were treated in all respects just as Emma had been. When Mrs. Notley was told by Charles that Emma had been placed in charge, she replied, "Is that so?" as if it did not make much impression on her. Just how much ill-feeling existed between Emma and Mrs. Notley is doubtful. They were together more or less at the table, in the parlor, riding, traveling, &c. Emma wrote for her to come to Honolulu when Mr. Notley grew worse in his last illness and she came and stayed at Emma's house some weeks. There is testimony that they did not often speak to each other, that they passed as strangers, though all agree that Mrs. Notley could not speak English and Emma could not speak Hawaiian. A Portuguese

who worked for the Notleys when he was a boy, the only witness outside of the Notleys as to the troubles after Emma's arrival, testified that he never saw any conversation between Emma and Mrs. Notley, and "no good faces", but he says also that they could not speak each other's languages, that he never heard Emma say anything cross to any of the Notleys and that she always conducted herself as a lady. He said also that Mrs. Notley often talked to herself and cried and that Mr. Notley and Emma did not appear to be moved by it. Once Emma asked a lady school teacher who took meals at the Notley's to excuse Mrs. Notley for going around in a chemise, thus showing her disposition to undermine Mrs. Notley, and once she told this school teacher, who was an American, that she preferred the English to the American accent of "neither", and the school teacher stopped taking her meals there a day or two after,—whether because of this, or whether, against Mr. Notley's desire, because Emma did not like the school teacher and wanted her to go, does not appear. An attempt was made to show that Emma on one occasion had her servant burn an album that belonged to Mrs. Notley, but it appeared that the servant was a regular household servant, though at a time when Emma was in general charge, that it was at a general cleaning up shortly before Emma's marriage, and there was no evidence to show that Emma knew anything about it. On another occasion when Mrs. Notley "ate rather ravenously" after a long fasting and seasickness, Emma, it is said, looked disgusted and remarked, "Why does aunt eat so?" On another occasion after some conversation in which Mr. and Mrs. Notley and Emma took part, Mr. Notley ordered some rose bushes pulled up to make way for a tennis court. There were tears rolling down Mrs. Notley's cheeks. She had brought water for these roses from some distance in dry seasons. The witness, the Portuguese boy above mentioned, said that he did not know what was said in the conversation, and Mrs. Notley herself was not called as a witness. Mr. Notley once took Emma to the Volcano—where it is said he had never taken his wife. On two

occasions he is said to have struck his wife. One of these was in January, 1888, more than eleven years before the will was executed, when, because of a disagreement over some crockery that had been loaned to a neighbor, Mr. Notley struck his wife, knocking her down, and was very repentant immediately afterwards. On this occasion Emma, who was in the yard just after returning from the neighbor's, and who apparently did not see Mr. Notley strike his wife, but saw there was trouble, called to him to "drive that black woman out of the yard, do, uncle, do." One of the witnesses thought that Mr. Notley, who was some distance away and excited, did not hear this, and testified that Emma never before or after called Mrs. Notley a black woman. The other occasion was in February, 1899. It seems that Emma,—during a visit to the Notleys after her marriage,—had recommended having Miss Barnard come to the house and teach the granddaughters music, &c., and be a companion to them. One of the granddaughters testified that, about a week after Emma had returned to Honolulu, she heard Mr. and Mrs. Notley talking about pictures and Miss Barnard in another room and the words "take that" and what seemed like clapping hands and that Mrs. Notley's eyes were swollen, though not so much as to prevent her from going to church the same day. Several other incidents occurred the same month. Mr. Notley was to accompany Emma back to Honolulu. His trunk and valise were packed and the carriage was at the door. Mrs. Notley said that she did not want him to go, that Emma had a husband who could come and take her back himself. She pushed Emma aside and pushed Mr. Notley into a chair and held him there. Some of his vest buttons came off. Emma cried and said it was the last time she would come there; also, "Who is this woman that you should listen to her?" Mr. Notley did not return with Emma, although counsel contended that "he entertained such confidence in her that he never once opposed her will." Another incident that occurred the same month arose out of a scandalous rumor in regard to some ladies. The manager of a neighboring plantation came to the house and charged

Charles with it, and another called him a liar. Mr. Notley also called him a liar and wanted him to apologize, but he said that he did not make the alleged scandalous statement and declined to apologize. He (Charles) also testified that the ladies in question were friends of Emma, but that he did not know whether she had anything to do with originating or circulating the story. Referring to the trouble about Miss Barnard just mentioned, Charles also testified that Emma had tried to persuade him that Miss Barnard ought to come, and that he and Mr. Notley had talked the matter over afterwards and that the latter "began to get mad and said he owned the place, he was boss of the place and he would do just as he pleased." "He got furious and said if he could not do as he pleased he would shut up shop and leave." "He said, 'Well, we had planned with your cousin (Emma), that is our plan. If I cannot do it I will shut up shop and leave'." But Miss Barnard did not come. Going back to 1888, about two weeks after the incident in regard to the crockery, there was some trouble in which Charles and Emma and the same neighbor as in the crockery matter were concerned. What the trouble was does not appear, but Charles' wife testified that at first Mr. Notley believed Charles and later Emma and then turned Charles and his wife out but after four days he believed Charles again and had them come back and was then very angry with Emma and left shortly after to take her back to England but that after getting as far as Honolulu, he placed her in a family there to be educated and returned home himself. Charles and his wife had been turned out once before, in 1886, by Mr. Notley because his (Charles') wife would not sew for Emma. In 1897, it is contended, Emma tried to have one of the granddaughters, who was visiting the Notleys sent home. She was exercising a supervision over her as well as over two younger granddaughters. It seems that the granddaughter was somewhat ill and that Emma attributed this to too much horseback riding and in the presence of the granddaughter telephoned to the latter's father in Kohala that she was ill from too much horseback riding and did not obey her

(Emma). Mrs. Notley, however, protested and wailed and succeeded in preventing the granddaughter from being sent home. It seems also that Emma had brought the granddaughter from Kohala and accompanied her on her return later. This granddaughter testified also that Mr. Notley was very kind to her, kissed her, &c., and treated everyone there alike, namely, his wife, Charles' four children, Emma, Miss Barnard, and herself; also that on one occasion Emma told one of Charles' children that she was more to Mr. Notley than his wife, that once Emma told the granddaughter that it was not ladylike to sit on Mr. Notley's lap, but that upon her going away and returning she found Emma in her place, and that once Emma told her that Mr. Notley preferred to be alone at his morning meal after the granddaughter had twice taken coffee with him. Another granddaughter testified that she once found Emma listening near the door when Mr. Notley and another gentleman were talking in the parlor, but that she, the witness, had done the same thing when Mr. Notley and his wife had disputes. Other incidents relied on to show Emma's controlling influence were these: On one occasion Mr. Notley made some plans for an addition to the house, which his son David was to build. David proposed changes in the plans but Mr. Notley did not accept them, but when they were all talking the matter over at the table Emma proposed the same changes and Mr. Notley adopted them. The Portuguese mentioned testified that sometimes when Mr. Notley was talking with his wife in the ironing room, he heard Emma's voice calling for him and that he always went when so called—whether to the telephone or to see a caller or for what does not appear. On another occasion on her return from a drive Emma said that she liked the horse very much and was going to ask Mr. Notley for it, and, on being told that she probably would not succeed in getting it, replied that she would get it just the same, and after a while the witness saw the horse in her possession. This witness said also that he was told by his sister Maria that Mr. Notley gave her also a horse at the same time. To show Emma's influence over Mr. Not-

ley, much is made of his alleged indifference of attitude towards the others on several visits to Honolulu. In December, 1900, he visited Maria, and was more like his old self and gave many Christmas presents. Emma was then on Kauai. But in April following, when Emma was in Honolulu, he was cooler, and in October following when he was at Emma's house he was cooler still. But it also appeared that he wrote Emma about the good time he had had at Christmas with the others, and in April he not only visited Maria, though Emma was in Honolulu, but gave a bicycle to each of Maria's four children, though it was not Christmas time, and in October he called at Maria's about twice a week though he was staying with Emma. But it is said that when he drove by Maria's place in October he would look in when Emma was not with him but not when Emma was with him. Perhaps the two most important incidents relied on are the following to show her connection with the will. Just before Emma's wedding, according to Charles, he was preparing to get the dancing tent ready and to decorate with ferns, when Emma came out and said that she did not think there was any use in going on with the preparations as Maria had telephoned that she would not come because Emma was described as daughter instead of niece in the invitations, and Emma said that it was very funny, and that she had thought that the others always took her in as a sister, but Charles replied that he had not, and that he had learned that Mr. Notley had bought property in her name in Honolulu (a \$5000 home as a wedding gift) and that he, Charles, did not think it was right towards his mother. Emma said she did not know of it and that if that was the way he thought of Uncle, she would see that he did not get anything out of this property. She also said that she had adoption papers, which Charles says he did not know of before. Charles told her he did not know who she was. He testified that he must have insulted her then, that he was mad because his father bought the property and that he did not doubt that Emma knew nothing about it beforehand. The other occasion was in February, 1899, when in Mr. Notley's hearing she, being worked up, said

to Charles that she would see that Miss Barnard would get something out of the property, and Mr. Notley thereupon said to her, "get back, get back." Several incidents are relied on to show that Mr. Notley confided in Emma and discussed his plans with her to the exclusion of the family. For instance, Maria testified that in 1898 when she and Emma were talking of different things the latter mentioned that Mr. Notley intended to take a trip to New Zealand, but did not know whether he would go then or not, and that this was the first time she, the witness, had heard about it, but she also testified that Mr. Notley himself afterwards spoke to her about it—and whether she had not learned of it before because she was away from home, or whether Mr. Notley had spoken of the trip to other members of the family, does not appear. It is contended that in the boom times in 1899 he let Emma but not the others know of an option he gave to Mr. Andrade on his Hawaii property for \$1,000,000. That option was negotiated at Emma's house but not in Emma's presence. The proposition came from Mr. Andrade. A clause was inserted in the agreement to the effect that Mr. Notley did not guarantee a release of his wife's dower. He told Mr. Andrade that he would try and secure a release but that he should keep the matter secret because his son Charles was a rascal and had more influence with his wife than he had and might knock the plan on the head. Later he wrote to his son William, who had written about the option, and denied that he had offered to sell his property, but also wanted to know who had told him and that he, Mr. Notley, did not have anything to do with Charles because he, Charles, had treated him like a brute. Later he apparently told David about it and tried to get him to use his influence with Mrs. Notley, to secure a release of dower, and gave him \$2000 and spoke to him in much the same way about Charles. Likewise it is contended that he discussed his will with Emma but not with the others. This is shown, it is contended, by the fact that he told Emma that she was to have the homestead—which he gave to her in the second codicil. But it also appears that he had twice spoken to his daughter Maria

in regard to the subject of the first codicil before executing it. Considerable is made of the contention that Emma practically ostracised David—forcing him to be a mere dock laborer, but she and David appear to have been very friendly, and Mr. Notley had expressed gratification that David was the only son that had not squandered his money and had admired him because he was working on the docks, and David himself says that his father took him to dine with him on Sundays, when in Honolulu, that he lived in a house that was under his father's control, that he obtained through his father's influence a government job which he held six or eight years, that when his father engaged him to build an addition to the house on Hawaii he returned to Honolulu of his own accord, that he worked on the docks of his own volition, and that he did not blame either Mr. Notley or Emma for it, although he does say that his father once refused to pay a doctor's bill for him, and once refused to take him to the plantation to work, but also that besides the \$2000 above mentioned his father gave \$5000 to him as well as to each of the other children in 1897. To show that Emma was scheming all along for the decedent's property and cared nothing for him, it is shown that on the night before he died Emma said she would have nothing more to do with him after he was dead, and that the funeral was held at the undertaking parlors. This remark is rather ambiguous. Whether she meant that she did not want anything to do with him or that the members of the family and not she would have the decision as to the funeral arrangements is not clear. Emma proposed that his body be taken home to Hawaii and buried at the church he had helped to build. Maria, the witness on this point, thought it a good plan and suggested it to the mother. The latter, however, did not like it. And then Emma made the remark mentioned. Whether she declined to have the funeral at her house or not, or why it was not held at Maria's does not appear. It does appear that when Mr. Notley was ill on Hawaii she was sent for by Mr. Lydgate, who represented that he was not receiving the attention he needed—not because the wife and granddaughters did not do all

they could but because they were not sufficiently skilled,—that she went up and took care of him, that he improved and was brought to Honolulu, that she nursed him until a trained nurse was obtained, that she wrote to Mrs. Notley to come down when he got worse, that the latter came and stayed at Emma's house until Mr. Notley's death, and that David called after the funeral to thank her, Emma, for what she had done for his father.

The foregoing comprise nearly all the incidents relied on by the contestants, but of course without all the shadings and settings, or the embellishments of counsel's arguments. Comment on them is hardly necessary, except to say that in most instances the first statements—unsatisfactory enough in themselves,—were so qualified and explained later by the contestants' own witnesses as to remove most of what little force they would otherwise have. All that is necessary is to read them in the light of the principles, above set forth, of the law of undue influence in connection with wills. There is considerable evidence of something, but of what? A jury might be justified in finding that Emma's presence and conduct produced a decided change for the worse in the Notley family, that she and Mr. Notley thought a great deal of each other, and even that she had the disposition and opportunity to try to influence him in the matter of his will, but not that he was weak-minded or that she had a general control over him, or that she did control him or substitute her will for his in the final disposition of his property.

But, it is contended, the will itself is a loud witness—it is "unnatural" and "reeks and drips with undue influence" and carries out Emma's previous threats. First, \$1000 out of \$400,000, perhaps twice that value at the date of the will, is given to Emma's friend, Miss Barnard, but it may be added that Miss Barnard was also a friend of Mr. Notley. She had lived near by, as a school teacher. On the death of the one with whom she was staying, Mr. Notley invited her to his house, where she remained a long time. One of the contestants' witnesses says that Mr. Notley treated her like the rest at his home. When Emma said that she would see that Miss Barnard got

something, Mr. Notley rebuked her. When she tried to have Miss Barnard become an inmate of the Notley home a second time, she failed. Whether she ever spoke to Mr. Notley again about Miss Barnard's getting something, does not appear. If she did, and even if he inserted the item in the will in consequence, there is nothing to indicate that he did so because, not wishing to, he could not resist. Secondly, it is said that Emma prevented Mr. Notley from giving his own brother more than \$500 and compelled him to give her father, the husband of Mr. Notley's sister, that amount—as much as to his own brother. No comment is necessary—especially in the absence of any evidence as to the circumstances of the brother and brother-in-law or of Mr. Notley's inclinations towards them. As to the main provision of the will, it is not strange that he treated Emma like the other children, considering what she had been to him for fourteen years; it is true that he gave her as much as the wife, but he also gave the others the same; that he did not give his wife more is perhaps not strange, considering her advanced age and simple tastes. As to the homestead, while he did not give that to his wife, he did not give it to Emma by the will. As to Charles, he himself repeatedly indicated sufficient reasons for leaving him out. These were stated by him not only to Mr. Lydgate and Mr. Brown but to his children, William, David and Maria, and to Mr. Andrade. He felt that Charles had disgraced his name by defaulting when employed in the customs house at Hilo, and he had to pay \$7000 to clear him. He said that he resigned from the constitutional convention or the Legislature because of the disgrace brought on his name. He blamed Charles for the trouble between himself and his wife. He blamed him for squandering his money. He called him a rascal to Mr. Andrade. He had, as shown above, had difficulties with him at home. And yet he gave to Charles' children what he did not give to Charles, except as to the insurance. As to the first codicil it is contended that Emma had the testator substitute for one of the executors another who was not a member of the family, but the substitute was a friend and the attorney

of Mr. Notley and accepted only at the latter's earnest request and Emma had then never even met him, and the substitution was made when Emma was hundreds of miles away, and neither of the persons previously named as executors were members of the family, and the facts stated above are ample to explain why Mr. Notley did not wish to appoint Charles, who alone, it is contended, would have been appointed but for Emma, because the testator had twice told Maria that he thought some of appointing Charles. As to the second codicil, the homestead, while not given to the wife, was not taken from her, but was taken from David, with whom Emma was most friendly, and the wife to whom Emma was perhaps most hostile was given what she was not to have before—a life interest in the cottage which she had long occupied. The homestead was apparently not of very great value. The objection is that it was not given to the wife.

The will may not be commendable. It may not be what a jury might think it should be, but it is not unnatural in the sense contended. The question is not what the testator ought to have done or what Emma ought to get, but whether the right of the testator to dispose of his property as he pleased, subject to statutory limitations, may be taken from him on mere suspicions or conjectures and that, too, when he can not be heard. The following is from *In re Langford*, 108 Cal. 608:

"The consideration of the question whether or not a will is 'unnatural'—by which is meant, we suppose, different from what it might have been expected to have been—is of no importance except in a case where there is some evidence immediately tending to show mental incapacity, fraud or undue influence; in which event it might serve to help out a weak case. But there is no evidence in the case at bar that could be thus helped out. A will cannot be upset *because* in the opinion of a jury or court it is unnatural. In the opinion of the McDevitt case it is said: 'Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, Is the will the sponta-

neous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and the courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper.' * * * And indeed, if it were important to consider it, we do not see how the will in the case at bar can be considered unnatural in such extreme case as to be remarkable. At the time of the execution of the will the contestants—children of the first wife—were all grown up, middle-aged people, with families of their own. He had seen but little of them after his marriage, and in a few years afterward he had moved away from them to California. They had strenuously opposed the marriage, and had said unkind things to his wife; and, as was very natural, there was not much social intercourse between the families afterward. * * * Of course, the contestants attribute this to the influence of the appellant, and they testify to statements which they say the decedent made to them tending to support that view; nevertheless the fact was that they came to California against his protests and thereby greatly displeased him. * * * Looking through the transcript in this case we see no evidence at all sufficient to warrant a jury in annulling the solemn acts by which the decedent executed his will, and republished it in the codicil. If the law is to be changed, and the right of disposing of one's property by will, the policy of which has been sanctioned by the wisdom and experience of many generations of men, is to be taken away, that result must be effected by the legislative department of the government. As the law now stands that right cannot be frittered away after the death of the testator according to the tastes and notions of others. It is quite likely that in the case at bar the provisions of the will did not meet with the approval of the jurors; but their approval was not necessary."

In Cauffman v. Long, 82 Pa. St., 72, the following language is used:

"The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is

not to be encouraged. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust, the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern. The law wisely secures equality of distribution where a man dies intestate. But the very object of a will is to produce inequality, and to provide for the wants of the testator's family; to protect those who are helpless; to reward those who have been affectionate, and to punish those who have been disobedient. It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human race. It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them; he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, but is the uncontrolled act of his own mind, it is not to be set aside in Pennsylvania without sufficient evidence, nor upon any sentimental notions of equality."

The contestants rely in general on two classes of cases. The principal case in one of these classes is *Dean v. Negley*, 41 Pa. St. 312. This is cited to show that while the influence of a lawful relation over testamentary dispositions may be proper, that of an unlawful relation is not proper, the contention being that Emma was a continuing trespasser in the Notley home. Of course, there was nothing unlawful in Mr. Notley's taking his niece and bringing her up as his daughter. The case relied on belongs to the class in which a devise or bequest is made in favor of one with whom the testator has lived in illicit intercourse. No doubt such adulterous cohabitation may be shown—to be considered on the question of undue influence in connection with other circumstances, although a testator may lawfully

leave all his property to his mistress to the exclusion of his lawful wife, subject to statutory restrictions, if he does so with a free and sound mind. Most authorities do not go as far as the case cited, and even that case not only contains strong language in support of the views we have expressed in this opinion, but differs greatly from this case in its facts. There the relation was unlawful; here not. There the testator was of weak mind; here not. There the beneficiary was a strong woman, who had controlled the testator in other business matters; here not. See *Conley v. Nailor*, 118 U. S. 127, cited above; *Arnault v. Arnault*, 52 N. J. Eq. 801.

The other class of cases relied on is represented by *Rollwagon v. Rollwagon*, 63 N. Y., 504; *Tuler v. Gardner*, 35 N. Y. 559; and *Delafield v. Parish*, 25 N. Y. 9. These cases are cited on the question of general influence and other incidental questions. They differ from this case as white from black. Counsel rely largely on isolated expressions contained in these cases. It will be impracticable to set forth all the respects in which the facts differ from those in this case. By way of illustration we may mention that in the *Rollwagon* case, among other points of difference, the testator, an uneducated man of great wealth, who had married his housekeeper not long before, more at her seeking than his, and who was entirely dependent on her, was a confirmed invalid and so far gone that he could not speak, and the wife sent for the attorney and gave him all the instructions as to the contents of the will. The wonder is that there were dissenting opinions in these cases. In the *Gardner* case, for instance, all the members of the Supreme Court and three members of the court of appeals held that the charge of undue influence was not made out. Other cases above cited in this opinion are much more in point. Special attention may be called to one of them, a very recent case decided by the Supreme Court of the United States, *Beyer v. LeFevre*, 186 U. S. 114. That was a case in which the testatrix, after giving five dollars each to two sisters and a niece, left all the rest of her property, including the homestead, to a nephew and niece, whom she had brought

up, to the exclusion of her husband, but on condition that they should provide a home for him. In the trial court a jury found against the will on the issue of undue influence. On appeal the Circuit Court of Appeals sustained the decree based on the verdict. The case was a much stronger one for the contestants than the present case in several important respects. The language of the Court on the various phases of the case is so peculiarly applicable to the present case that we would like to give it in full, but this opinion is already too long. The Court referred to its rule not to examine the facts when both the trial and appellate courts below agreed and especially when in the first instance the facts had been found by a jury, but said that at the same time it was the right and duty of the court to set aside a verdict when it was wholly unwarranted by the testimony, and then after reviewing and commenting on the facts, concluded as follows:

“One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.”

A number of exceptions were taken to rulings rejecting or admitting evidence. These need not be considered in detail. The rulings were either correct or else were harmless errors in the view that we take of the case.

The exceptions are overruled and the case remanded to the Circuit Court for such further proceedings as may be proper and consistent with this opinion.

Holmes & Stanley, C. Brown and G. A. Davis for proponents.

Kinney & McClanahan and J. J. Dunne for contestants.

DISSENTING OPINION OF GALBRAITH, J.

I am constrained to withhold my assent to the judgment of the Court in this cause as well as to the reasoning on which it is based although I agree that the rules of law quoted and cited are in the main correct and well established but the application made of those rules in this case is, in my opinion, clearly erroneous.

It is undoubtedly true, as stated by the majority, that, "In deciding the question whether there is sufficient evidence of undue influence in the making of a will to go to the jury, the evidence must be considered in the light most favorable to the contestants; the proponents must be considered as admitting not only the facts which the contestants' evidence tends to establish but every inference which a jury might fairly draw from such evidence." In other words, a motion to direct a verdict, like a demurrer to the evidence, admits not only what the testimony proves, but also every conclusion or inference a jury might fairly or reasonably draw therefrom and in the consideration of such motion the court should take that view of the evidence most favorable to the party against whom it is directed and should deny the motion when reasonable men might fairly differ as to the effect of the facts proved or in the inferences to be drawn from them or when in any view of the evidence the party against whom the motion is directed should prevail.

These principles applied to this case do not justify shading the evidence in favor of the proponents or taking that view of it most favorable to them. For instance, these principles do not warrant the deduction that the son, Charles, was disinherited on account of the Hilo Custom House episode—whatever that was—in 1895, since it is clear that there was a reconciliation between him and his father after that for the latter invited Charles and his family to return to the homestead to reside and they did return there and remained during the greater part of the years 1896, 1897 and 1898. Again in 1897 when the decedent gave each of his children and Miss Mullinger five thousand

dollars, Charles was included and treated the same as the others. Is it not more reasonable to infer that the cause of Charles' disfavor with the decedent arose subsequent to 1897? Was it caused by Emma Danford's dislike for Charles and by undue influence exerted by her over decedent or by some other influence? Whatever the cause may have been I am not able to say under the evidence that reasonable men would agree in their conclusion or attribute it to the same cause.

The testator died May 2, 1902. The will and codicils admitted to probate as his last will and testament were as follows:

"Know all men by these presents, that I Charles Notley, of Paauilo, in the District of Hamakua, Island of Hawaii, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking and making null and void all wills by me heretofore made.

"I hereby nominate and appoint Thomas Rain Walker, of Honolulu, Island of Oahu, and Anthony Lidgate of Paauilo, in the Island of Hawaii, to be the Executors and Trustees of this my last will and testament, to serve as such without giving bonds.

"First. I give, devise and bequeath unto Miss Josephine M. Barnard of Laupahoehoe, Island of Hawaii, the sum of One Thousand Dollars.

"Second. I give, devise and bequeath unto my brother John Notley of Edgervare Road, Burnt Oak, London, England, the sum of Five Hundred Dollars; but in the event of my said brother John dying before me, then I give, devise and bequeath said sum of Five Hundred Dollars to Charlotte Notley, the wife of my said brother John, and in the event of the death of the said Charlotte Notley before me, then I give, devise and bequeath said sum of Five Hundred Dollars to Ada Baker of Edgervare Road, aforesaid, the granddaughter of my said brother John and his said wife Charlotte Notley.

"Third. I give, devise and bequeath unto John Mullinger of South Lopham, County of Norfolk, England, the sum of Five Hundred Dollars.

"Fourth. I give, devise and bequeath unto my son David Fyfe Notley and his heirs my homestead lot or dwelling house and premises situate at Paauilo aforesaid, together with all and singular the furniture, crockery, plate, pictures, linen and

household furniture of every kind as well as all carriages and other vehicles used for pleasure or otherwise, being in and upon the said building and premises.

"Fifth. I give, devise and bequeath to my wife, Mary K. Notley, and my children William Notley, Maria, the wife of Thomas Hughes, and David Fyfe Notley, and my niece Emma Danford, neé Mullinger, the proceeds in money arising from and out of the Policy of Insurance on my life No. 126095 in the New York Mutual Life Insurance Company, share and share alike.

"Sixth. All the rest, residue and remainder of my estate, real, personal or mixed, and wherever situate, I give, devise and bequeath unto the said Thomas Rain Walker and Anthony Lidgate, in trust nevertheless for the uses and purposes herein set forth, that is to say: to pay the rents, issues and profits arising from and out of my said estate in manner following:

"One-sixth thereof to my wife Mary K. Notley during the term of her natural life, such payments to be in lieu of her dower right in my estate, and from and after the death of my said wife, the said one-sixth share or part of said income shall be divided among the surviving devisees named in this my will in the shares and proportions hereinafter set forth and limited to each of them.

"One-sixth thereof to my son William during the term of his natural life, and from and after the death of my said son William, then to Melisa, the wife of said William, during the term of her natural life; and from and after the death of the said Melisa the said one-sixth share or part of said income shall be divided among the surviving devisees share and share alike.

"One-sixth thereof unto the children of my son Charles Notley Jr., named, John, Victoria, Maria, Lilly and William, share and share alike. And I hereby direct my said Trustees not to pay any of said share of the said income unto any of the above named children of my said son Charles Notley Jr. until such time as each of them, being males, shall arrive at the age of twenty-one years, and, being females, shall arrive at the age of eighteen years; and that in the meantime and until the happening of such event as to each of said children, I direct my said Trustees to keep said one-sixth share of said income invested in such securities as they or their successors may think proper, and the income, rents, issues or profits thereof shall be divided equally among said children upon the arrival of them at the

age of twenty-one and eighteen years respectively as hereinbefore limited. And in the event of the death of any of said children before the arriving at the ages aforesaid, or in the event of their death after the arrival at the ages aforesaid, the heirs of such children shall take the share of the child so dying.

"One-sixth thereof unto my daughter Maria, the wife of Thomas Hughes, during the term of her natural life, free from all control or liability of the marital rights of any husband.

"One-sixth thereof to my son David Fyfe Notley, during the term of his natural life, and

"One-sixth thereof to my niece Emma Danford, neé Mullinger, during the term of her natural life free from all control or liability of the marital rights of any husband.

"And from and after the death of all my said children and my said niece Emma Danford, neé Mullinger, I hereby direct my said Trustees or their successors to convey all of my estate among the heirs-at-law of my said children William, Maria, David Fyfe, and my said niece Emma Danford, neé Mullinger, and the children of my said son Charles Notley, Jr., namely:—John, Victoria, Maria, Lilly and William, share and share alike.

"And I direct, that until the death of all the legatees last named, the income accruing from said trust estate, shall, until such event happen, be paid among the heirs-at-law of all such as may have died before the death of the survivor of said last named legatees.

"In the event of the death, resignation or any disability of my said Trustees or either of them, I hereby direct the Court having jurisdiction of the Probate matters and wherein my will is probated to appoint a new Trustee or Trustees as the case may be.

"I hereby authorize and empower my said Trustees or their successors to make such changes and alterations in the nature and kind of investments of my estate and vary the same in such manner as in their discretion will result to the best advantage of said estate, and also to use, handle, control, invest and re-invest all property belonging to said estate in such manner as to them shall seem proper for the best interest of those interested in said estate.

"In witness whereof, I have hereunto set my hand and seal this 18th day of May, 1899.

(Signed) CHAS. NOTLEY. (SEAL)

"Signed, sealed, published and declared by the said Charles

Notley as and for his last will and testament in the presence of us, who in his presence and in the presence of each other, and at his request, have hereunto set our hands as witnesses this 18th day of May, 1899.

“(Signed) CECIL BROWN,
Honolulu.

“(Signed) FRANK F. FERNANDES,
Honolulu.

“(Signed) ALEX. ST. M. MACKINTOSH,
Honolulu.”

“Codicil to the Last Will and Testament of me, Charles Notley, the elder, of Paauilo, in the District of Hamakua, Island of Hawaii, which bears date the 18th day of May, 1899.

“Whereas, by my said last will and testament I have appointed Thomas Rain Walker to be one of the Executors and Trustees thereof, and as the said Thomas Rain Walker intends to depart out of the Territory of Hawaii and reside in England, I am desirous that Cecil Brown of Honolulu, in the Island of Oahu, shall be substituted as a trustee and executor of my said Will, and to serve as such in the place of said Thomas Rain Walker.

“Now, therefore, I do hereby revoke the appointment of said Thomas Rain Walker as such executor and trustee, and do hereby nominate and appoint the said Cecil Brown to be an executor and trustee of my said last will and testament in the place and stead of said Thomas Rain Walker, and to serve as such without giving bonds.

“And I declare that my said last will and testament shall be construed and take effect as if the name of the said Cecil Brown were inserted therein throughout instead of said Thomas Rain Walker's name. In all other respects I confirm my said Will.

“In witness Whereof I have hereunto set my hand and seal at Paauilo aforesaid, this 2nd day of August, 1900.

“(Signed) CHARLES NOTLEY.

“Subscribed by the Testator in the presence of each of us, and at the same time declared by him to us to be a codicil to his last will and testament, and thereupon, we, at his request, sign our names hereto as witnesses, this second day of August, 1900.

“(Signed) WM. H. SIEBECKER.

“(Signed) J. LEONHART.”

"This is a second codicil to my last Will and Testament which bears date the 18th day of May, 1899.

"First: I hereby ratify and confirm my said Will and the first codicil thereto in every respect, save and except so far as the said Will and codicil is altered by and is inconsistent with this codicil.

"Second: I hereby revoke the fourth clause or subdivision of my said Will on page two thereof, being the devise to my son David Fyfe Notley of my homestead lot or dwelling house and premises and household furniture, etc., and other property therein mentioned, and in place thereof,

"I give, devise and bequeath unto my niece Emma Danford, the wife of H. D. Danford, of Honolulu, in the Island of Oahu, all of that real property situate and being at Paauilo, in the District of Hamakua, Island of Hawaii, and Territory of Hawaii, at present occupied, used and enjoyed by me as my residence or homestead, and contains about four acres, together with all the household furniture, plate, silver-ware, linen and all and every other kind of fixtures and utensils therein or used in connection therewith, including the carriages, harnesses and horses used by me in said Hamakua, and being a part of my household property and generally used and enjoyed by me in connection therewith.

"To have and to hold the same unto the said Emma Danford, for her sole and separate use and behoof forever.

"Provided, however, and it is my wish, and I hereby declare that my wife Mary K. Notley shall have the use and occupation of the cottage that is upon said residence premises and which lies on the north side of the tennis grounds on said premises, together with all the use of the furniture and household fixtures in said cottage, for and during the term of her natural life.

"In Witness Whereof, I, Charles Notley, the elder, have hereunto subscribed my hand and seal at Honolulu, in the Island of Oahu and Territory aforesaid, this 11th day of April, 1902.

"(Signed) CHAS. NOTLEY. (SEAL)

"Subscribed by the said Charles Notley, the elder, in the presence of each of us, and at the same time declared by him to us to be the second codicil to his last will and testament, and thereupon, we, at his request, and in his presence hereto sign

our names as witnesses at Honolulu aforesaid, this 11th day of April, 1902.

“(Signed) CECIL BROWN,
“Honolulu.

“(Signed) FRANK F. FERNANDEZ,
“Honolulu.”

The questions of facts framed by the contestants for the jury were as follows:

1. “Are the documents dated May 18, 1899, August 2, 1900, and April 11, 1902. * * * the last will and testament of Charles Notley, deceased?”

2. “Were such alleged will and codicils executed and published by the said Charles Notley under and by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing thereof?”

The trial in the circuit court commenced on January 23, 1903, and ended five days thereafter by the verdict rendered by direction of the court. Many witnesses were examined on behalf of the contestants. The transcript of the evidence constitutes some four hundred typewritten pages besides numerous exhibits consisting of letters, contracts, deeds, etc.

The motion to direct the verdict was based on the ground that there was no evidence to support the theory of the contestants and presumably granted for that reason.

It is contended by the contestants that the arrival of Miss Mullinger wrought a distinct change in the Notley family—that it was contemporaneous with the springing up of discord and family bickerings that scattered the children from the homestead and caused the decedent to strike his wife, something he had never been known to do before, and finally ended in the installation of Miss Mullinger as mistress of the home and the location of the wife and mother in a small cottage in the yard; that Miss Mullinger usurped the place in the decedent's affections that of right belonged to the wife; that in all disagreements between Miss Mullinger and other members of the family, and these were not infrequent, the decedent uniformly sided with the former and against the latter; that for years prior to the execution of the will and up to the time of

decedent's death Miss Mullinger's wish was the law of the Notley family and that the provisions of the will and codicils, namely, that disinheriting the son, Charles, the clause tying up the bequest to his children until the youngest becomes of age, the bequest to Miss Barnard who had no claim on decedent's bounty, and the codicil bequeathing the homestead to Mrs. Danford instead of the wife, with the other evidence given, demonstrates that the will and codicils admitted to probate express the wish and desire of Mrs. Danford and were not the free and voluntary act of the decedent.

The evidence given, much of which is referred to in the majority opinion, tended in some degree to establish many of these contentions either directly or indirectly.

There can be no doubt from the evidence that Mrs. Danford had ample opportunity to exercise undue influence over the decedent and there is also testimony tending to show a disposition to influence him against Charles and the mother providing she had the power to do so.

The lawyer who wrote the will testifies that it is the free and voluntary act of the decedent. The will was executed May 18, 1899, while Mr. Notley was stopping at Mrs. Danford's, on Kinau street, Honolulu, and following the visit of Mrs. Danford to Hamakua in February, 1899, when she and the decedent had tried to induce Charles to persuade his mother to permit Miss Barnard to be installed in the house as governess.

It is in evidence that when this effort resulted in failure Mrs. Danford said she would see that Miss Barnard was remembered in decedent's will. It was only the preceding October, on the day before her marriage, that Mrs. Danford threatened Charles in effect that she would see that he did not get anything by "uncle's will".

The attorney who wrote the second codicil testifies relative to its execution, in part as follows:

"He came into the office I think three or four times previously, and took the will, which was sealed in an envelope, he took and read it over and told me to put it back with the other papers

in the safe, then he came on this day and told me he wanted to make a change.

“Q. How did he look?

“A. He was suffering from a very bad cough, the slightest exertion made him cough, otherwise he looked very well.

“Q. You knew him intimately for a number of years?

“A. Very intimately. I knew that he was down here on account of being ill, under treatment of Dr. at the time for congestion of the lungs.

“Q. What would you suppose as to whether or not that man on that day was in full possession of his mental faculties?

“A. I am just as positive that he was in full possession of his mental faculties as I am here today.

“Q. And you drew that second codicil to the will absolutely in accordance with the old man's instructions?

“A. I did it with his instructions, the second codicil. I received my instructions from him. * * * * *

“Q. Who was present at the time he signed the second codicil?

“A. Mr. Fernandez, I told Mr. Notley at the time; I noticed that he coughed so much, there was such a strain on him, I said: Mr. Notley, if you like I will bring this codicil up to the house where you are staying, and you can execute it there, it will save you from walking around so much; and he thanked me and said, ‘That is all right, you are a good boy,’ etc.

“Q. Who was present when you executed that second codicil?

“A. I, with Frank Fernandez, nobody else, Mrs. Danford wasn't there. The only time I saw her was when she brought some ink. He read the second codicil over himself, and I read it over to him.”

This testimony certainly proves that the decedent was at least physically weak at the time of the execution of the second codicil and that his environment, at that time, was favorable to the exertion of undue influence as contended by the contestants.

The question presented by the exception under consideration is not whether the evidence shows that the will and codicils were executed under and by virtue of undue influence exercised by Mrs. Danford but whether there is any evidence from which the jury may have reasonably inferred that such undue influence was exercised.

"It is impossible to define or describe with precision and exactness what is undue influence; what the quality and the extent of the power of one mind over another must be to make it *undue*, in the sense of the law when exerted in making a will. Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each case. (*Lynch v. Clements*, 24 N. J. Eq. 431). But the influence exercised over a testator which the law regards as undue or illegal, must be such as to destroy his free agency; but no matter how little the influence, if the free agency is destroyed it vitiates the act which is the result of it." * * * * *

"The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the conditions of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." *Rollwagon v. Rollwagon*, 63 N. Y. 504, 519.

It was said by the Supreme Court of Michigan in deciding a recent case: "The principal question urged in the case, and pressed upon our attention with great vigor by proponent, is that of whether there was any evidence tending to show the exercise of undue influence which justified the submission of the case to the jury. It is undoubtedly true that the testimony relating to the exact time of the execution of this instrument strongly supports the proponent's case. The testimony of Judge Whipple, who drew the will, and of the witnesses who attested it, clearly demonstrates that, at the precise time of the execution of the will, no immediate, present influence was being exerted to control the mind and will of Dr. Reed. But this is not decisive of the case. If an unwarranted influence had been exerted theretofore, the effect of which still remained, and which was sufficient in fact to subordinate the will of Dr. Reed to that of Hannah Waters, this influence was undue, as much as though it were exerted at the very time the will was executed. See *Petter's Appeal*, 53 Mich. 106, (18 N. W. 575.) Indeed it is recognized by the authorities that undue influence is usually

exercised secretly, and in a clandestine manner; and, as was said by Mr. Justice Grant in *Rivard v. Rivard*, 109 Mich. 111 (66 N. W. 686, 63 Am. St. Rep. 570): " 'It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control.' See also 1 Underh. Wills, §132." *Waters v. Reed*, 129 Mich. 131, 135, 136.

The motion to direct a verdict, like a demurrer to the evidence, admits not only the facts stated therein but also every conclusion or inference which a jury might fairly or reasonably infer therefrom. *Parks v. Ress*, 11 How. 362. "Such a motion, like a demurrer to the evidence, admits not only what the testimony proves, but what it tends to prove. The ultimate facts, in other words, are admitted." *Railroad Company v. Woodson*, 134 U. S. 614, 621.

"We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take the view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party. * * * * * We only wish to be understood as holding that whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the court to submit the case to the jury, under proper instructions. It is certainly not his function to weigh the evidence for the purpose of saying how

the verdict should go." *Railroad Company v. Lewery*, 74 Fed. 463, 477.

The case should be submitted to the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Dunlap v. Railroad Co.*, 130 U. S. 649.

"The motion at the close of plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed without usurpation, upon the part of the court, of the functions of the jury. Where the cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper instructions as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." *Insurance Co. v. Doster*, 106 U. S. 30.

The rule is also expressed as follows: "If different minds might draw different conclusions or inferences from facts proved, the case should be left to the jury; and so, likewise, in the cases of doubt as to the proper inferences to be drawn." *Railroad Company v. Stout*, 84 U. S. 657; *Railroad Company v. Ives*, 144 id. 408, 417; *Railroad v. Gentry*, 163 id. 353, 368; *Beatty v. Life Assn.*, 75 Fed. 65, 68.

A careful examination of the voluminous record in this cause satisfies me that there was evidence which, unexplained and undenied, tended to prove that Emma Danford exerted undue influence over the decedent in the execution of the will and codicils. It certainly is clear that reasonable men might honestly differ in their view as to the effect of the facts proved and the inferences to be drawn therefrom. In my opinion it was impossible for the Circuit Judge to take the view of the evidence most favorable to the contestants, as the law demands he should, and direct a verdict for the proponents.

Notwithstanding the fact that the testimony relating to the exact time of the execution of the will and codicils fails to show

any immediate present influence being exerted to control the mind and will of the decedent, I cannot overlook the fact that Emma Mullinger, when a girl of thirteen, after a few weeks acquaintance with her uncle, the decedent, voluntarily left her home, father and mother and came to this far away land to live with him and from that time until his death was apparently very much attached to him and lost no opportunity to make a show of affection for him but as soon as he was dead permitted his body to be taken from her home, where he died, and the funeral services to be conducted from an undertaker's parlors; that she had an aversion for Charles Notley and his mother and that every prediction or threat made by her relative to the disposition of decedent's property was verified by the terms of the will when published and that she had ample opportunity to exert undue influence over the decedent. These with other incidents showing a disposition on the part of the decedent to yield to the wish of Emma Danford in many matters certainly tend to support the theory of the contestants.

The contestants certainly had the right to demand that the evidence be submitted to the jury and to have their free and fair judgment thereon. The denial of that right and the direction of the verdict by the Circuit Judge was a clear usurpation of the functions of the jury.

While the trial judge has the undoubted right to take a cause from the jury and to direct a verdict in certain cases, this power should be exercised with great care and caution. Under our system of laws the jury are the constituted triers of the facts. When a party elects a trial by jury he has the right to demand the judgment of the jury on the facts. The trial judge is frequently called upon to act upon the spur of the moment, without sufficient opportunity to analyze or consider the testimony. This fact alone should induce him to give the party against whom the motion is directed the benefit of every reasonable doubt and not to take the case from the jury unless his duty to do so is clear.

I am convinced that it was error for the Circuit Judge to

direct the verdict in this cause and that the exceptions ought to be sustained.

In re ASSESSMENT OF TAXES, KASH COMPANY,
LIMITED.

In re ASSESSMENT OF TAXES, PACIFIC HARDWARE
COMPANY, LIMITED.

APPEALS FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED MARCH 3, 1904.

DECIDED MARCH 12, 1904.

GALBRAITH AND PERRY, JJ., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF FREAR, C.J., DISQUALIFIED.

The "full cash value", within the meaning of the tax statute, of a stock of goods, wares and merchandise is not necessarily the value represented by the inventory and carried on the books of the owner for business purposes. It may be less, and it may also be more. The "full cash value", under the tax law, of a stock of goods, wares and merchandise, is what such goods would bring at a sale for cash (on the date of assessment), whether as a whole or in lots or separately,—by whatever of these methods the highest aggregate returns would be obtained, provided all the goods were sold on the same day.

OPINION OF THE COURT BY PERRY, J.

The Kash Co., Ltd., a corporation owning and conducting a wholesale and retail (mainly retail) dry goods business, returned its stock of "goods, wares and merchandise" at \$36043.74. The assessor ascertained that these goods were carried on the books of the owner at an inventoried value of

\$45054.67 and assessed them at the latter figure. The Tax Appeal Court sustained the return. The Pacific Hardware Co., Ltd., engaged in the hardware and general merchandise business, returned its stock of "goods wares and merchandise" at \$270363.41, which was raised by the assessor to \$318074.61, the inventory value. In this instance, also, the return was sustained by the Tax Court. The amounts returned were arrived at by deducting in the Kash Co. case 20% and in the other 15% from the valuation carried in the respective inventories. The contention of the assessor is that such stocks of goods cannot lawfully be returned for taxation purposes at less than the values placed by the owners in their inventories and these appeals were originally taken by the taxpayers to ascertain whether that contention is well founded in law.

Whether or not goods, wares and merchandise or other property can be returned at a valuation less than that placed thereon by the owners in inventories kept for business or other private purposes, depends in each particular instance upon the method of reaching the inventory valuation,—upon what that valuation represents. The court cannot say that in no case can such a deduction be made, nor can it say that in no case can the valuation for taxation purposes be higher than that found in such an inventory. The statute has laid down the standard of measurement which is to govern in all cases and that is the "full cash value". If a stock of goods has been placed in a private inventory at its full cash value, that is the valuation at which such property is taxable; if at more than its full cash value, a reduction from the face of the inventory, sufficient to reach the full cash value, should be made in the return and assessment; and if at less than the full cash value, there should be a sufficient increase to make the valuation in the return and assessment represent the full cash value. The issue in each case is one of fact to be determined in view of all the circumstances.

What is the "full cash value"? "It seems to us that the salable value is the true test of the full cash value, and that, we believe, has been hitherto assumed by bench and bar in cases

that have come before this court, that is, when, as here, there is nothing to prevent a sale. Of course, where there is something to prevent a sale, as in the case of a non-assignable leasehold interest, some other test will be adopted, as, for instance, what the property would be worth if it were salable. * * * To test the value in cases like the present by what the property is worth to the owner or at its cost of production rather than at its market value would not only not be sound, but would often be exceedingly difficult and uncertain."—*In re Assessment of Taxes, J. B. Castle, ante* p. 1. That statement of the law, so far as it goes, we know of no reason to modify. It applies to the cases at bar, in neither of which is there anything to prevent a sale within the meaning of the rule. In one respect, however, these cases differ from the Castle case, in that in the latter the property consisted chiefly of one indivisible item, a dwelling house, while in each of these the stock of goods is composed of many separable articles of clothing, tools, etc., and the additional question is raised by the parties whether the salable value to be ascertained is that of the stock of goods as a whole or of its various component articles separately. As to that, the salable value means, we think, the highest cash price obtainable for the goods on the market on the date of assessment prescribed by law, whether such highest price be obtainable, at public auction or at private sale, by selling them as a whole, or by selling them in lots or by selling each article separately, provided that *all* the articles,—the whole stock—are sold *on that day*. Ordinarily, with stocks as large as those involved in the cases at bar, it may be that by selling each article separately no more will be realized in the aggregate than by selling the stock as a whole, even though it be the fact, as it undoubtedly is, that in the ordinary course of business extending throughout the year some articles are sold at much higher rates than the average obtainable at a sale of all. On the other hand it may be that there are some stocks of goods so small and of such a character that better total results will follow from separate sales on the assessment day than from a sale as a whole, but such are probably exceptional cases.

For the assessor it is contended that the statute does not contemplate a value ascertainable by a forced sale. The statute does contemplate the salable value on a day named, that is, the value shown by a sale if had on that day and not by daily sales, piecemeal, extending throughout a year or more. We are not required by the facts in these cases to say whether or not this means a forced sale upon short notice which the owner cannot avoid and from which he cannot obtain as good results as if he had been allowed ample time for preparation to secure all possible bidders. The view most favorable to the appellant may be assumed to be the correct one, namely, that the sale is one had upon that day, not through compulsion, but because the day seems as advantageous as any other either shortly before or shortly after it, and had, further, after all the preparation and notice desired to secure the highest possible bids either within or without the territory. Still, the present appeals cannot be sustained, for the evidence shows that, measured by such a sale, the stocks of goods are, respectively, not of a cash value higher than that returned.

That the full cash value may be less than that represented in the owner's private inventory, was decided in the *Grinbaum & Co. tax case*, 14 Haw. 692, where the valuation fixed by the court was about 18½% less than the total shown by the inventory.

The Kash Co.'s goods were inventoried at their cost to the owners, landed in Honolulu, with no reduction for shopwear, broken sizes or lots, or depreciation for any other causes. In the *Pacific Hardware Co. case*, the inventory valuation represents the cost of the goods landed here with three months' interest added thereto, less deductions made for actual damage found in taking stock, but with no allowance for over stock, slow stock, dead stock or for depreciation caused otherwise than as above stated. In each case the deduction now claimed is for depreciation for causes for which no allowance was made in the inventory. Considerable evidence by experts and other witnesses was introduced by the taxpayers tending to show that the salable

value of the property in question on January 1, 1903, did not exceed the value returned. That evidence was uncontradicted. We are satisfied that in each case the valuation placed in the inventory was higher and that returned not lower than the full cash value and therefore affirm the decisions appealed from.

Robertson & Wilder for the assessor.

Smith & Lewis for the taxpayers.

F. L. MINI and A. VERZASCONI v. HILO SUGAR COMPANY, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JANUARY 30, 1904. DECIDED MARCH 16, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A finding that a lessee was evicted and did not voluntarily surrender possession, held supported by the evidence.

Where under a lease the lessor is authorized, upon failure of the lessee to pay the rent or any portion thereof, to declare a forfeiture of the lease and to re-enter after "demand made therefor", the making of a demand for a sum substantially larger than the amount of rent due is not a compliance with the prerequisite named and will not support an attempted forfeiture based thereon.

Where the provision of the lease is that such forfeiture may be declared and re-entry made upon failure to pay the rent after ten days' demand therefor, an attempted forfeiture and a re-entry nine days after demand are unauthorized by the contract and ineffectual to terminate the lease.

A finding that the defendant took certain sugar cane under a mortgage and contract with the lessees, and that there was no contract, express or implied, between the lessor and the defendant for the purchase and sale of the same, held supported by the evidence.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$1632 for cane alleged to have been sold and delivered by the plaintiffs to the defendant. The defendant concedes that it received the cane referred to in the plaintiff's declaration and that the reasonable value of such cane was \$1468.10, but it denies that it purchased or received the cane from the plaintiffs and that the cane was the property of the plaintiffs at the time when it was cut and received and contends that at that time it was the property of one H. Kishi or of his trustee in bankruptcy, Kishi having been declared a bankrupt on February 2, 1903, and was taken under a certain mortgage and contract with Kishi and his predecessors in interest.

The following are facts shown by undisputed evidence: On July 8, 1899, A. Grossi and A. Verzasconi executed to H. Kishi, G. Shimooka, K. Yamada, R. Mujita and J. Tanaka a lease for the term of six years from its date of certain land at Hilo, Hawaii, containing an area of 33.9 acres at a rental of \$25 per acre per year. On the 26th of the same month Grossi and Verzasconi entered into an agreement in writing with the Hilo Sugar Co. whereby the latter agreed to buy from the former, at certain stated prices, all the sugar cane which they might grow upon their land (that leased to Kishi and others) within the period of ten years next ensuing, and the owner agreed to cultivate as much cane as they should be able to plant on the land and to sell the same to the Hilo Sugar Co. and to no one else. Yamada and Mujita on August 12, 1899, assigned by instrument in writing to their three co-lessees all of their interest under the lease of July 8, 1899, and subsequently and prior to November 5, 1902, there was an attempted surrender or oral transfer by Shimooka and Tanaka of their interests to Kishi. The finding and ruling of the Circuit Judge on this point is that these last two mentioned interests became vested in Kishi. On April 1, 1902, Kishi, Shimooka and Tanaka executed to the Hilo Sugar Co., to secure the payment of a debt of \$220 then due and future

advances, a mortgage of all the cane growing and to be grown during the term of two years next following on the land leased to them by Grossi and Verzasconi, and by the same instrument agreed to cultivate all of the land in cane during that period and to sell to the Hilo Sugar Co. at certain prices named (the same as are named in the Grossi agreement, with a slight exception not material in this case) all of the cane so grown. This instrument was not recorded in the Registry Office until February 26, 1903.

Kishi and his co-lessees took possession of the demised premises under their lease and cultivated and harvested therefrom two crops of cane, one of these being cut in July, 1901, and the other in September, 1902. Certain installments of rent were paid, the last one, of \$1026.35, on October 25, 1902. Two days later Grossi and Verzasconi sent to their lessees a written notice of which the following is a copy: "Hilo, Hawaii, October 27th, 1902. H. Kishi, et als., Kaumana, Hawaii. Sirs: You are hereby notified that there is now due and owing to us from you the sum of One Thousand Two Hundred Eighty-nine and 75-100 (\$1289.75) Dollars for rent and interest on same as per lease executed between us and you dated July 8th, 1899, and that the same has been due and owing to us from you from July 8th, 1902. You are hereby further notified, in accordance with said lease, to pay said rent and interest, in arrears, within ten days from date of this notice, otherwise we shall enter and take possession of the premises, etc., now under lease to you." On October 27, 1902, A. Grossi conveyed his half interest in the land to F. L. Mini, and on November 5, 1902, the lessors re-entered and took possession of the land and growing crops. On February 2, 1903, Kishi was, upon his own petition filed January 30, 1903, declared a bankrupt and on March 10, 1903, the trustee of his estate made demand, in writing, upon Grossi and Verzasconi for the land and crops as part of the bankrupt's property, claiming that the re-entry was void because made within four months prior to the adjudication of bankruptcy. The cane, for the

alleged price of which this action was brought, was cut in April, 1903.

Trial by jury was waived. The Circuit Court held that the attempted enforcement of the forfeiture of the lease was illegal and that the title to the cane did not pass to the plaintiffs and further that the cane was taken by the defendant, not by virtue of any contract of purchase and sale with the lessors but under its mortgage and contract with the lessees and ordered judgment for the defendant.

One of the exceptions mainly relied upon is to the finding of the court below that the lessee was evicted on November 5, 1902, the contention being that the evidence shows that there was on that date a voluntary surrender by the lessee and not an eviction by the lessor. Kishi, upon whose testimony is based the claim of a surrender, testified, presumably through an interpreter: "The rattoons were captured by the lessor; lessor said to us that if the balance of the rental is not paid within ten days he would take possession of the cane; that was the lessor said to me on the 5th of October last, said to me that if any portion of rent is not paid I will take the possession of the cane; that" (the taking) "was on the 5th of November last year." In answer to the question, "State what they did in capturing the property?" he said: "They asked me to leave the place, so I left the place; I surrender and went some other place;" and, continuing his testimony: "They took, the lessors took possession of the cane and cut them this year, cut those canes this year." It was for the trial court, sitting in place of a jury, to construe the language of the witness and upon his whole testimony to say whether the witness intended to testify that the yielding of possession was voluntary or against his will. We cannot say that the court could not have reasonably found that it was the latter. Moreover, the plaintiff Verzasconi in rebuttal, in answer to the question, "Did you enter under the terms of your lease which has been introduced by defendant and take possession or on account of the non-payment of rent?" said: "On account of the non-payment of rent, yes, sir." And also answered in the affirmative

the question, "Have you and your partner, Mini, since taking possession of this lease, forfeiting the cane, leased any of their land to any other parties?" This is additional evidence, though slight, tending to support a finding of an entry *in invitum*. The question is not, of course, whether we would make the same finding upon the evidence but merely whether the finding made is unsupported by the evidence. We cannot say that it is.

The entry or eviction, then, took place less than ten days after the making of the demand and was unauthorized by the terms of the lease and ineffectual to terminate the lessee's estate. The provision of the lease is, in this respect: "It is further stipulated and agreed that in case the parties of the second part, their heirs and assigns shall fail to pay said rent or any portion thereof, when the same becomes due and payable or within ten days thereafter and demand therefor, * * * then and in that event the parties of the first part may, at their option, declare this lease forfeited and may cancel and annul the same and may re-enter and take possession of said premises without process of law and eject any and all persons occupying the same." For another reason, also, the forfeiture was not successfully enforced. The total rent paid from the commencement of the lease was, as found by the Circuit Judge, \$1871.35 (findings 9 and 11); the total accrued to November 5, 1902, was \$2966.25, leaving a balance due, at the date of demand, of \$1094.90 and not of \$1289.75 as demanded. A party endeavoring to enforce a forfeiture must comply strictly with the tenor of the contract that he is acting under. A demand for substantially more than the amount due is not such a demand as is required by the contract in the case at bar.

Another exception is to the finding that the defendant took the cane under its mortgage and contract with Kishi and, inferentially, that there was no contract of sale and purchase between the plaintiffs and the defendant. This finding is amply supported by the evidence. The plaintiffs' testimony is that on or about October 17, 1902, they went to the defendant's office and asked its bookkeeper, Mr. Balding, "when they were going to

come up and cut my cane" and that he answered that they would do so as soon as possible. That is the substance of the only conversation relied upon as showing a special contract of sale of this cane. Mr. Balding's explanation on the witness stand was that lessors with whose lessees the defendant has similar contracts were in the habit of inquiring at times concerning the prospect of the cutting of cane on their lands, that he generally gave them the desired information and that that was all he did in telling the plaintiffs that their cane would be cut as soon as possible. Mr. Balding further testified that the cane was cut under the mortgage and contract with Kishi. The Circuit Court believed the testimony of this witness and made a finding in conformity with it. That finding cannot be disturbed under the circumstances.

The burden was upon the plaintiffs to show that they sold to the defendant and that the defendant purchased of them the cane upon the express oral contract relied upon. Failing in this, as they did, the burden was upon them to show at least that the cane was theirs and that therefore the general contract of July 26, 1899, was applicable and that the defendant was liable to them for the full value of the cane under that general contract or upon an implied contract. But this also they failed to do, because the forfeiture relied upon by them as the sole transfer of the title which theretofore was admittedly in the lessees was unauthorized by the contract and illegal.

It will be unnecessary to consider the question of the validity or force of the defendant's mortgage from Kishi as affected by the fact that it was not recorded until after the date of the alleged forfeiture of the lease. If the plaintiffs were not the owners of the cane and did not sell it to the defendant, it is immaterial whether or not the defendant had a valid lien upon it.

Exceptions were noted to certain rulings upon questions of the admissibility of evidence. In the view which we take of the

case, those rulings were either correct or the errors, if any, were not prejudicial.

The exceptions are overruled.

Wise & Ross for the plaintiffs.

Smith & Parsons for the defendant.

JONAH K. KALANIANAOLE *v.* W. W. DIMOND & COMPANY LIMITED, and ARTHUR M. BROWN, HIGH SHERIFF.

ORIGINAL.

SUBMITTED FEBRUARY 8, 1904. DECIDED MARCH 16, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A notification to the defendant in a District Court summons that "upon default to attend at the time and place above mentioned judgment will be rendered against him *ex parte* by default," which is the form set forth in C.L., §1210, is sufficient, although Sec. 1209 prescribes in general terms that the summons "shall contain a notification to the defendant that if he fails to attend at the time and place of trial designated in the writ, judgment will be rendered upon default according to the evidence taken *ex parte*."

A police officer is a constable within the meaning of our statutes and may serve process directed by a District Court to a constable.

When summons, returnable at 1:30 p. m. of a certain day, is not served until that day, and the District Court grants a continuance, it will be presumed that the service was made before the order of continuance.

A District Court summons may be served under our statutes and practice by showing the defendant the original and leaving a copy with him. It is unnecessary to read the original to him.

An *alias* execution issued after the dismissal of an appeal may be good even though the original may have been bad because issued pending an appeal from a District Court.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

This is an application for a writ of prohibition to prevent the respondents from proceeding with an execution issued by the District Magistrate of Honolulu to enforce a judgment for \$282 obtained by the respondent W. W. Dimond & Co., Ltd., against the petitioner herein in an action of assumpsit for the value of goods sold and delivered. Several contentions are made, which will be considered in order.

First, that the summons which was issued and served was not in the form required by the statute. The statute (C.L., Sec. 1209) provides, among other things, that the summons in a civil action in a District Court "shall contain a notification to the defendant that if he fails to attend at the time and place of trial designated in the writ, judgment will be rendered upon default according to the evidence taken *ex parte*." The summons in this case (which is in the usual printed form) directs the officer, among other things, to "notify the said Prince Kuhio Kalaniana'ole that upon default to attend at the time and place above mentioned, judgment will be rendered against him *ex parte* by default." The next section of the statute, however, which sets forth the form of the summons in a case in which an attachment is issued, but which prescribes the entire form in civil actions, contains the identical words found in the form used in the present case. This shows that the Legislature regarded and intended the form prescribed and used as a compliance with the form described in general terms.

Secondly, that the summons was not served by any officer to whom it was directed. It was directed "to the High Sheriff of the Territory of Hawaii, his Deputy; the Sheriff of the Island of Oahu, his Deputy; or any Constable in the District of Honolulu, Island of Oahu, Territory of Hawaii." The return is signed "George Waipa, Police Officer". The question is whether a police officer is a constable within the meaning of our statutes. Of course, in a general sense, the high sheriff, sheriffs and

deputies are all police officers, and if "police officers" in this instance could or should be taken to mean any of them, there could be no further question on this point. But we will assume that "police officer" is used here in its specific sense as meaning what is often spoken of as a policeman. In this sense, "police officer" is, under our statutes, synonymous with "constable". Whether there was any distinction between these terms under former statutes, now repealed, we need not say. There is nothing in the general meaning of those titles to prevent their use interchangeably, and our present statutes use them throughout, and they occur in many places in the statutes, as if there were no distinction. In some places they are both used in the same section in such a way as to clearly show that they were regarded as having the same meaning, as, for instance, in C. L. Sec. 1032, which provides for their appointment.

Thirdly, that the summons was not served by an officer qualified by law to serve it; in other words, that a constable cannot serve an ordinary civil summons issued by a District Magistrate. We will assume that this cannot be done without statutory authority. It is immaterial what special statutory provisions there are in certain other jurisdictions, though we believe that in most jurisdictions constables are authorized to serve the process of courts that correspond to our District Courts. There is ample authority for this in our statutes, and this is reinforced by the long-continued practice and the reenactment of old provisions on this subject with the knowledge of such practice, as, for instance, in the Judiciary Act of 1892. In that Act we find forms set forth for civil summons, warrants of arrest, and commitments issued by District Magistrates—all copied from earlier statutes and all directed, "To any Constable of the District of, Island of, H. I.", or other equivalent words. C. L., Sec. 1210; P. L. Secs. 606, 610. The statute provides that such forms are sufficient, and yet if a constable, to whom alone the process might be directed, could not serve it, how could it be sufficient? Other provisions are in harmony with these. For instance, C. L., Sec. 1219, pro-

vides for the form of the return of the process "of any court *
* * not of record * * * by any officer * * * of the
police force." C. L., Sec. 1036, provides for service by some
disinterested person "in all cases in which the * * * con-
stable shall be a party," etc.

Fourthly, that the summons is not shown to have been served before the court assumed to act under it by ordering a continuance. The summons was issued September 5, 1903, but not served until the return day, September 9, 1903. The writ was returnable at 1:30 p. m. of that day. There is no statute here requiring service before the return day. It has been held elsewhere that even when there is such a statute, a failure to make service until the return day is not a fatal defect. *Meisse v. McCoy's Adm'r.*, 17 Oh. St. 225. The question here is merely whether it should be assumed that the service was made before the order of continuance. It is a general rule that the law does not take account of fractions of a day, but it is equally true that fractions of a day are noticed when justice requires it, and that where several judicial acts are performed on the same day, they will be presumed to have been performed in the natural or proper or legal order, in the absence of any showing to the contrary. The service in this instance must therefore be presumed to have preceded the order of continuance.

Fifthly, that the summons was served in an improper manner in that it was by leaving a copy with the defendant and showing him the original instead of leaving a copy and reading the original. The statute does not definitely prescribe the manner of service in ordinary cases in District Court cases. It prescribes for summary proceedings by landlords in District Courts the method pursued in this case. C. L., Sec. 1681. It prescribes the present method also for civil actions in courts of record (C. L., Sec. 1218), and apparently contemplates a similar return in cases in both courts of record and courts not of record. C. L., Sec. 1219. The method pursued in this case is the one that has been long pursued in District Court cases. In our opinion it is sufficient.

Sixthly, that execution was issued pending an appeal to the Circuit Court, thereby practically depriving the defendant of his constitutional right of trial by jury. See *Wong Chow v. Dickey*, 14 Haw. 524. It seems that the plaintiff below, at the request of one Moses Keohokalole, who assumed to act for the defendant, on the return day procured a continuance until the 17th of the same month; that the defendant did not appear on the 17th until after judgment by default had been rendered against him; that he then noted an appeal to the Circuit Court; that on the following day, but three days before the appeal was perfected, the plaintiff took out an execution; that the appeal was dismissed in the Circuit Court on the ground that no appeal lies from a default judgment (see *Luce v. Chin Wa*, 5 Haw. 629); that afterwards the execution was returned unsatisfied; that then, after the dismissal of the appeal, an *alias* execution was issued, which was the one under which the respondents herein were acting when this writ of prohibition was applied for. This was apparently the principal ground for this application, but now that it appears that the execution under which the respondents were acting is the one issued after the dismissal of the appeal and not the one issued pending the appeal, which is the one referred to in the petition and which the petitioner's attorney says in his brief is the one he supposed the respondents were then acting under, there is not much to be said except that, in our opinion, the contention now made that an *alias* execution cannot stand unless the original could stand, is not well founded.

Whether a judgment by default is appealable, whether execution may issue under the present statute under any circumstances pending an appeal from a District Court, or whether any of the alleged defects, if they were defects, would be fatal or could be taken advantage of on prohibition, or were waived by the failure to set them up in the lower court or by the defendant's appealing or taking other action in the lower court, it is unnecessary to say.

The application is denied and the temporary writ dissolved.
C. W. Ashford for petitioner.

Thayer & Hemenway for respondents.

DISSENTING OPINION OF GALBRAITH, J.

The general rule is that process must be served by the officer to whom it is directed, if served by an officer, and if served by a private person, where such service is permitted by statute, the authority for so doing must be endorsed on the process. 19 Ency. P. & P. 577, 578; *Penrose v. McKinzie*, 116 Ind. 35; *Pelham v. Edwards*, 26 Pac. 41; *Johnson v. Delbridge*, 35 Mich. 436 *Leavit v. Leavit*, 135 Mass. 193; *Gadsby v. Stiner*, 79 Mich. 260.

The service of summons in the case wherein the judgment complained of was rendered was made by a "police officer" although it was directed to "The High Sheriff of the Territory of Hawaii, his Deputy; the Sheriff of the Island of Oahu, his Deputy; or any constable in the District of Honolulu, Island of Oahu, Territory of Hawaii."

It is found by the majority of the Court that a "police officer" is a constable within the meaning of the statute and that the service made was good.

I respectfully submit that each of these findings is erroneous. If a constable is a police officer he is not the only police officer. The High Sheriff, his Deputy and the Sheriffs of the various islands of the Territory and their Deputies are each "police officers" and members of the "police force" but no one of them can properly be called a constable. Even if it were admitted that a police officer and a constable are one and the same it does not follow that such officer under either name can serve a summons in a civil case. I have been unable to find a statute expressly authorizing a police officer or constable, as such, to make service of summons.

It is provided in the Civil Code of 1859, Sec. 257, that: "there shall be appointed by the King, upon the nomination of the Minister of the Interior, some person of good moral character and discretion, to be Chief of Police, who shall be styled the Marshal of the Kingdom." That among other duties the Marshal shall "execute all lawful precepts, and mandates di-

rected to him by the King, or by any Judge, court, minister or governor." Sec. 261: That "said Marshal shall have power with the approval of the respective governors, to appoint a Deputy in each gubernatorial division of the Kingdom, who shall be styled the Sheriff of such division; and said Marshal and his Deputies may command all necessary assistance, civil or military, in the execution of their duties." Sec. 261.

The condition of the sheriff's bond is set out in Sec. 262, his tenure of office in Sec. 263, and in Sec. 264 he is authorized to appoint deputies on the approval of the Marshal.

Sec. 266 provides for the appointment of constables as follows: "The governors of the Kingdom shall appoint a certain number of constables for each district in the islands under their respective jurisdictions, who shall be under the control of the Marshal and his Deputies; but they may be removed at any time by the Governors, Marshal, any Judge of a court of record, or police justice." The succeeding section regulates the number of constables that may be appointed and prescribes that there shall not be more than one hundred for the Island of Oahu, and the same for Maui and its dependencies, and the same for Hawaii and fifty for Kauai and Niihau: "Provided, always, that nothing in this section contained shall be construed to prevent the respective governors from appointing any number of special constables, to serve without pay, in case of, and during any great emergency."

The only provision in the Civil Code governing the internal police that I have been able to find, relating to the duties of constables, is that in the above section prescribing that "they shall be under the control of the Marshal and his deputies." From this fact it may be inferred that constables were petty officers, without statutory duties, subject to the direction and control of the Marshal and his deputies.

Sec. 268 authorized the court to appoint some disinterested person to act as substitute in serving process in cases where the "Marshal, or any sheriff, deputy sheriff or constable, shall be a party, plaintiff or defendant." This section was reenacted

by the Act of 1888 (Sec. 14) and is brought forward as Section 1036, C. L.

Under chapter 15, Civil Code, regulating the practice in Police Court—the court under the former system that corresponded to the present District Court—the form of a writ of attachment, a warrant for arrest and a mittimus is set out and the direction is “to any constable of the District of, Island of, H. I.” (Secs. 897, 901, 904) and the constable was given authority to “return” such process, an attachment writ, in one instance (Sec. 898). This last section and the other sections last above enumerated were repealed by the act to reorganize the Judiciary, Chapter 57, Laws of 1892, Sec. 79, although the form of a writ of attachment (Sec. 15), a warrant of arrest (Sec. 18) and a mittimus (Sec. 22) to be issued by District Magistrates, directed as in the Civil Code “To any constable”, were set out in this last Act. This, however, I contend, was not sufficient to confer power on a constable, even if such officer exists under the present law, to serve the enumerated process or a summons, in the absence of a statute expressly conferring such power. It may be that the setting out of these forms should be taken as an indication of an intention or willingness on the part of the legislature that constables should have the power to serve such process but the existence of an intention in the legislative mind that constables should have this power is something entirely different from an affirmative act giving it to them. The fact should not be overlooked in this connection that in setting out the forms the language of the statute, in each instance, is, “may be in the following form” (Chapt. 57, Secs. 15, 18 and 22, Laws 1892), not “must” or “shall be”, and is merely directory at most. The direction to the constable may have been an inadvertence or oversight or failure to note that the law authorizing the appointment of constables had been repealed.

At any rate neither in the Civil Code of 1859, or in the Judiciary Act of 1892, or in any other statute to which my atten-

tion has been called, is the form of summons set out or a constable specifically directed or authorized to serve the same.

By Act 8, Laws of 1888, the provisions of the Civil Code, regulating "Internal Police" was enacted. This act provides for a Marshal "who shall be chief of police of the Kingdom". This act also provides for the appointment of two deputies by the Marshal (Sec. 7), and the appointment of sheriffs for the various islands (Sec. 5) and Sec. 9 provides among other duties that the Marshal, and the several sheriffs, shall "execute all lawful process and mandates directed to them by any Judge, Court, Minister or other person thereunto authorized." (This section is published as Sec. 1031 C. L.).

Section 10 of said Act 8, reads in part: "The Marshal for and within the Island of Oahu, subject to the approval of the Attorney General and the several sheriffs for and within their respective jurisdictions, subject to the approval of the Marshal, may appoint such deputy sheriff and other police officers as occasion may require, and may dismiss them in their discretion; and may in like manner apportion the duties, and adjust the compensation of such officers, except as otherwise provided by law; Provided that the number of the Police officers or constables shall not exceed for the Island of Oahu, one hundred; * * * * * ; and further provided, that nothing in this section contained shall be construed to prevent the appointment of any number of special constables to serve without pay" * * *. (This section is brought forward as Section 1032 C. L.).

Section 1102 of the Civil Code (Section 1218, C. L.) was amended by Act 5, Laws of 1898, so as to direct the Marshal, or his deputy, or a sheriff or his deputy, to serve every summons issued under the seal of a court of record.

Section 79, of the Organic Act, changes the name of Marshal to that of High Sheriff and prescribes that he "shall have the powers and duties of the Marshal and deputies of the Republic of Hawaii under the laws of Hawaii, except as changed by this Act, and subject to modification by the legislature."

There is no specific direction in the statute prescribing the

manner of service of summons issued by a court not of record, such as the District Court, or to whom the same should be addressed.

The fact that there is no specific authority given by the statute to a constable or police officer to serve a summons in a civil case does not justify the search for such authority by implication, intendment or construction, since the High Sheriff and deputies have the undoubted authority to make such service. Nor can it be successfully maintained that the Marshal (High Sheriff) or his deputies (the sheriffs and their deputies) can give the subordinate officers such authority by verbal or even written direction, under the provisions of the statute empowering the former to "apportion the duties, and adjust the compensation of such officers", or that "they shall be under the control" of the Marshal and the sheriffs, or that "long-continued practice" can confer such authority.

It is suggested that Section 1219 C. L. gives such authority. This section reads in part, "In all cases where process of any court of record or not of record or any complaint, order or citation be served by any officer of the court or of the police force, including the Marshal, his deputy, or any sheriff or his deputies, a record thereof shall be endorsed upon the back of such process, complaint, order or citation. Such record shall state * * *. Such record shall be *prima facie* evidence of all it contains and no further proof shall be required * * *". I find no reason to believe that the phrase "any officer of the police force" used in this section is any broader than the specific enumeration of police officers that follow it. The Marshal, or High Sheriff, is Chief of Police and an officer of the police force. The other officers enumerated in the section are also officers of the police force.

This statute was not intended to confer authority on any officer to make service but was intended to provide proof of service when made by some officer having authority to do so. This clearly appears from an examination of the session laws. The Act contains one section and is entitled "An Act to facilitate the

proof of service of process in civil cases." Act 57, Laws 1888.

The fact that the summons was directed to a constable would not authorize him to serve it unless the statute gave him the power to do so.

In an action for divorce the summons was directed "to the sheriff, his deputy, or any constable of Boston" and was served by a constable of Boston. The court dismissed the libel on the ground that a constable had no authority to serve the summons. *Brown v. Brown*, 15 Mass. 389.

In a real action the summons was served by a constable and judgment rendered by default. The Supreme Court held the judgment void; that while the statute authorized a constable to serve summons in any personal action, this being a real and not a personal action, he had no authority to make the service; that the defendant had no legal notice of the suit and was not guilty of laches in neglecting to appear and defend. *Hart v. Huckins*, 6 Mass. 400.

Again the Supreme Court of Massachusetts said, "Constables are local officers of the peace elected by cities or towns. Originally their duties were to keep the peace, and they have no authority to serve process in civil actions, except such as is expressly conferred upon them by statute." *Leavit v. Leavit*, 135 Mass. 193.

A party was arrested by a City Marshal on a warrant directed "to any Constable" and entered into a recognizance and was defaulted. The Supreme Court said that the arrest was illegal and the bond given for his appearance void. *Hickey v. Forristal*, 49 Ill. 256. For other cases to the same effect see *Kyle v. Kyle*, 55 Ind. 387; *Kennedy v. The People*, 15 Ill. 418; *Gable v. City of Elizabeth*, 41 N. J. L. 316, 317; *Penrose v. McKinzie*, 116 Ind. 35; *Upper Appomattox Co. v. Buffaloe*, 121 N. C. 37; *Pelham v. Edwards* (Kan.) 26 Pac. 41; *Johnson v. Delbridge*, 35 Mich. 436; *Gadsby v. Stiner*, 79 Mich. 260.

I am convinced that the officer making the return of the summons, whether he made it as a police officer, as he signed himself, or as a constable, had no authority in either capacity, to make the

service and return. Therefore the court had not acquired jurisdiction of the person of the defendant at the time the default was entered and the judgment rendered was absolutely void.

There is a suggestion that any defect there might be in the service was cured by the subsequent appearance of the defendant in noting and prosecuting an appeal to the Circuit Court. This position is not tenable. If the judgment was void when rendered no subsequent appearance of the defendant made for the purpose of having it set aside could revitalize it. The District Court is a statutory court and must find authority for its process and judgments in the statute.

The judgment being void, the writ should be made perpetual.

S. AHMI v. ANNIE WALLER, LI CHEUNG, L. F. ALVAREZ, EMMELINE M. MAGOON, EMILY K. MEHRTENS, HELEN N. ROSA, MABEL C. LADD, EMILY L. LADD, CHINESE YOUNG MEN'S CHRISTIAN ASSOCIATION, J. K. KAUKUA, KAKAKUMAKA HALUALANI, LIWAI KOELEEELE and ABSALOM ULULAULA, Minors, by their Guardian *ad litem*, KAKAKUMAKA HALUALANI, EDWARD HORE and EN SYAK ASEU.

ERROR TO THE CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 17, 1904.

DECIDED MARCH 21, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In a deed of "all that piece of land situate at • • • , containing 15-100 of an acre and being the same described by metes and bounds" in a certain royal patent, the area of the land described in the patent being 1 5-100 acres, the description in the patent controls.

An allowance of undue latitude in the cross-examination of one of plaintiff's witnesses, resulting in bringing out matters of defense, is not reversible error, unless the plaintiff is prejudiced thereby.

OPINION OF THE COURT BY FREAR, C.J.

The action below was a statutory action to quiet the title to a piece of land at Kaakopua, Honolulu, covered by R. P. 217, L. C. A. 11076, issued to Kalaau. The plaintiff claimed by deed from a Mrs. Howland, who was Kalaau's devisee. The defendants claimed through deeds made by Kalaau to one Alakema Naone, and by the latter to Kapika, who was Kalaau's wife and who, after Kalaau's death, married said Naone. These were the deeds that were the subject of the decision in *Howland v. Naone*, 5 Haw. 308.

Two alleged errors are relied on, namely, that the trial Judge erred (1) in directing the jury to return a verdict for the defendants, and (2) in allowing the defendants to ask the plaintiff's witness, Naone, certain questions, which were objected to as not proper cross-examination.

The question of the propriety of directing the verdict resolves itself into the question of the construction of the deed from Kalaau. That deed of course, in so far as it is effective, prevails over the will. The question is whether it conveyed the whole 15-100 acres covered by the patent, as contended by the defendants, or only 15-100 of an acre as contended by the plaintiff. The description in the deed (translated from the Hawaiian) is, "all that piece of land situate at Kaakopua, Honolulu, Island of Oahu, containing an area of 15-100 of an acre and being the same described by metes and bounds in Royal Patent number 217." The description in the patent is a full description by courses and distances, adjoining lands and a diagram, and concludes (translated), "this piece contains 15-100 acre, more or less." The question is whether the description of the area in the deed or the particular description in the patent which is referred to in the deed, should control.

The general rule is that a patent, deed or other document re-

ferred to in a deed is to be read as if it were a part of the deed. It is also a general rule that a particular description prevails over a general description. It is a further general rule that a statement of the area of the land conveyed is a comparatively unimportant part of the description, or, as sometimes said, the least important part. From these rules, it follows that the description in the patent which is made by reference a part of the description in the deed should prevail over the mere statement of area in the deed. It is perhaps unnecessary to refer also to other established rules, such as that the construction put upon a deed by the parties, as shown by their possession, is entitled to consideration in a case of latent ambiguity or of conflict between two descriptions and that a deed should be construed most favorably to the grantee. There is indeed much reason to believe that the 15-100 in the deed was a mere mistake in copying, for the reason that it so nearly resembles in form the 15-100 in the patent, and it is said that in the record of the deed, the original being lost, the 15 is not directly over the 100 but is somewhat to the left. Moreover, the conveyance is not of a specific 15-100 of an acre, nor even of 15-100 of an acre of a larger tract, but it is of a piece of land at a certain place "containing" a certain area, "and being" the same as that described in the patent. No more emphasis is given to one description than to the other so far as the form is concerned.

It is true, as the plaintiff contends, that the reference to another document has been held not to control in certain cases, as in *Lovejoy v. Lovett*, 124 Mass. 270, and *Thorndike v. Richards*, 13 Me. 430, but in those cases the description in the deed in question was particular and of course would not be controlled by the general reference made to another document merely to show the grantor's chain of title. It is equally true that in some cases a reference to another document has been held to control even a particular description, as in *Bernstein v. Nealis*, 144 N. Y. 347, *Wuesthoff v. Seymour*, 22 N. J. Eq. 66, and *Lippett v. Kelley*, 46 Vt. 514. All these rules are merely rules of construc-

tion, and any one of them will yield to the intention of the parties as clearly shown by the whole instrument.

The other alleged error relied on is that after the plaintiff's witness, Naone, had testified on direct examination as to the relationship of various parties and as to who were living on the land, and, on cross-examination without objection, that Kalaau had devised the property to Mrs. Howland and that the witness had married Kalaau's widow and had lived on the land, he was allowed to be asked further, on cross-examination against objection, a number of questions, such as, how did you happen to live on the land, when did you marry her, did you not live on the land after the death of Kalaau and before you married his widow, under what claim did she live on the land after the death of her husband and before you married her, didn't she claim to have the right to live there under a deed from you, is this a copy of the deed from you under which she claimed to live there (showing witness a copy of a deed in a volume of records from the registry of conveyances); also that the witness was allowed, against objection, to read the said record and to testify as to its being a copy of the original, and that after testifying against objection that the "features of the record were similar to those of the deed he had executed to Kalaau's wife, he was allowed to be asked, against objection, do you mean by the use of the word "features" that the words of this instrument are the same as the words of the original; also that after the witness had volunteered the statement that he had received a deed from Kalaau, he was allowed to read the copy of it from the record, against objection, and to be asked if it was a copy of the original; and that the copies in the records were allowed to be introduced in evidence, after the witness had testified that he thought the originals were lost.

Defendant's counsel suggest that this was proper cross-examination, but without much confidence. Their main contention is that if it was not proper its allowance was harmless error. We will assume that it was not proper cross-examination. The latitude allowed on cross-examination is largely within the discre-

tion of the trial judge and the appellate court will not interfere unless that discretion is oppressively abused. If, as in *Hughes v. Westmoreland Coal Co.*, 104 Pa. St. 207, the court had ordered a nonsuit on the theory that the plaintiff's own testimony, brought out improperly on cross-examination, showed that he had no case, there might be reversible error. The testimony so brought out should be considered as if it were the defendant's testimony in chief and left to the jury as such. So, if, as in *Bell v. Prewitt*, 62 Ill. 361, the improper cross-examination was such as to probably influence the verdict, there would be reversible error. But ordinarily the question is one of the proper order of introducing evidence—which is largely a matter of discretion. In the present case the plaintiff put on evidence after the alleged improper cross-examination but, though having an opportunity to rebut it, made no attempt to do so. The defendants asked, not for a nonsuit on the theory that the plaintiff had shown that he had no case, but for a directed verdict on the theory that the evidence as a whole, whether regarded as plaintiff's or defendants' evidence, required it. It was simply a question of the order of proof of the deeds. The true construction of those deeds required the court to take the case from the jury. The verdict could not have been affected by the error in the order of proof nor was the evidence taken as a practical confession by the plaintiff that he had no case. Great care of course should be exercised in seeing that the cross-examination is not extended unreasonably far and the rule that it should be confined to matters brought out on the direct examination should be observed, but when, as here, no harm resulted, this Court should not set aside the verdict. These questions are discussed more fully in *Booth v. Beckley*, 11 Haw. 518.

The judgment below is affirmed.

C. W. Ashford and T. McCants Stewart for plaintiff.

Robertson & Wilder, Kinney & McClanahan, J. A. Magoon, J. Lightfoot, E. A. Douthitt, for defendants.

In re ASSESSMENT OF TAXES, FIRST AMERICAN
SAVINGS & TRUST COMPANY OF HAWAII.

In re ASSESSMENT OF TAXES, FIRST NATIONAL
BANK OF HAWAII.

In re ASSESSMENT OF TAXES, C. BREWER & COM-
PANY, LIMITED.

In re ASSESSMENT OF TAXES, E. O. HALL & SON,
LIMITED.

In re ASSESSMENT OF TAXES, WESTERN & HAWAII-
AN INVESTMENT COMPANY, LIMITED.

In re ASSESSMENT OF TAXES, CASTLE & COOKE,
LIMITED.

APPEALS FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

SUBMITTED MARCH 9, 1904.

DECIDED MARCH 23, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under the provision in the income tax law of 1901 allowing deductions of "all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred," losses of capital used in business may be deducted, if they occur during the tax year, as, for example, bank loans lost during the year though made prior thereto, notes given in payment for merchandise but which become valueless during the year, etc.

OPINION OF THE COURT BY FREAR, C.J.

These are appeals under the income tax law.

The assessor appeals in all these cases from decisions of the

Tax Appeal Court allowing certain deductions—mostly of bad debts. He contends that only losses of income as distinguished from losses of capital may be deducted and only such losses as have occurred during the year in question, and that in these cases the losses were in general losses of capital and occurred before the year. The statute is somewhat involved and not altogether clear. It is somewhat arbitrary in its provisions. Statutes in England, Canada and the United States have differed considerably from our statute, and the decisions under them have been comparatively few and more or less contradictory. It would be difficult and unsafe to attempt to lay down general propositions applicable to all cases or to state what may or may not be deducted under varying circumstances. In general it may be said that, in our opinion, losses of capital, at least working capital used in a business, as distinguished from ordinary investments, may be deducted under certain circumstances, but that only such losses may be deducted as have occurred within the year in question. The latter proposition seems to be clear. The other proposition is not as clear as it might be, but it receives more or less support in decisions elsewhere under statutes that do not go as far as ours in this direction. Our statute is extremely broad as compared with most other statutes, even including the Federal statute of 1894, which ours most resembles, but which was held unconstitutional, with the result that we have not the benefit of decisions construing it. Ours allows deductions, among other things, of "all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred." Laws of 1901, Act 20, Sec. 4. That losses of capital may be deducted under certain circumstances seems to be assumed in *Haw. Com. & Sug. Co. v. Assessor*, 14 Haw. 601. See also the decision on the motion for rehearing, 14 Haw. 687; also *Little Miami & Colum. & Zenia R. Co. v. U. S.*, 108 U. S. 277; *U. S. v. Mayer*, Deady 127; *Lawless v. Sullivan*, L. R. 6 App. Cas. 373; *Reid's Brewery Co. v. Male*, (1891), 2 A. C. 1. As to whether particular losses have occurred in a particular year or in some other year it is sometimes

difficult to say. More or less latitude should be allowed as to when debts, for instance, have become worthless. Probably a worthless debt could not be held to be written off in whole or in part in subsequent years for the purpose of evading the income tax law.

In the cases of the First American Savings & Trust Co. and the First National Bank the losses were of \$13,981.47 and \$19,275.00 respectively on a note of M. W. McChesney & Sons. This was a demand note given in 1900. It was for \$50000, divided into \$20000 and \$30000 between the two appellants in respect of ownership. The loan was made by them in the usual course of banking business. Interest was paid up to January 31, 1902. In July, 1902, default was made in the payment of interest. The balance of the note, after crediting the amount realized on the collateral securities, which it seems the holders of the notes bid in and which, according to the testimony, were absolutely worthless, was written off as a total loss—all except \$5000 which was retained on the books to be written off the following year because the appellants did not wish to write off all in one year. The testimony is that the whole of the debt is bad—apparently because of the failure of the Kona Sugar Co., certain bonds and stock in which were the principal securities to the note, and of M. W. McChesney & Sons, the agent of the sugar company and makers of the note. Such losses as these, not of capital permanently invested, but of loans made in the usual course of banking business, would seem to be deductible, provided they occurred during the year in question, July 1, 1902, June 30, 1903, even under narrower statutes than ours. See *Lawless v. Sullivan* and *Reid's Brewery Co. v. Male*, *supra*. In our opinion, they are deductible under our statute. They must, we think, be taken to have become losses during the year in question. There was no default in the payment of interest until a month after that year began. The testimony seems to indicate that the balance of the note was considered a total loss during that year and that must be taken to have been the finding of the Tax Appeal Court. There is no evidence that it was a

loss before that year began, although the amount that might be realized on it was uncertain.

The principal item in the case of C. Brewer & Co., Ltd., is similar to the items already considered. It was a note of the Kona Sugar Co., indorsed by M. W. McChesney & Sons, given in the course of business for railway material sold. It was dated February 5, 1901, when M. W. McChesney & Sons' credit was good. It was for \$4800.48, the balance unpaid, now in question, being \$3843.88. The Kona Sugar Co. failed and its property was sold at a receiver's sale in the early part of 1903 for not sufficient to pay its secured creditors. M. W. McChesney & Sons also failed in consequence. There was some stock, as collateral to the note, in the Hawaiian Navigation Co., Ltd., which failed before the Kona Sugar Co. The debt was then written off. The testimony shows that it was regarded as absolutely worthless then, but that up to the time or not long before there was some chance that the embarrassed companies might pull through. In our opinion, the decision of the Tax Appeal Court allowing the deduction should be affirmed.

Another item in the C. Brewer & Co. case was \$43.40 paid by the company as agent for the American Sugar Co. and correspondents of A. B. McClellán of Boston for stamps on a new issue of stock issued to him by the American Sugar Co. in 1901. Shortly after the American Sugar Co. failed and Mr. McClellán died, and in April, 1903, the debt was written off as worthless. While, as already stated, some discretion must be allowed business men in determining when a debt becomes bad and should be written off, it seems that in this instance no attempt was made to collect the amount and it was apparently as clearly worthless before July 1, 1902, as after that. If, as contended, it would have cost as much as, perhaps more than, the amount of the debt to collect it under the circumstances, that would probably be sufficient to justify not attempting to collect as a matter of good business sense and within the income tax law, but that would not justify holding it indefinitely and writing it

off at any time arbitrarily. It may be that there was good reason for holding it in this instance, but that does not appear.

In the case of E. O. Hall & Son, Ltd., the item is \$10320.60, representing stock in the Kona Sugar Co., which was written off as bad when that company failed. The stock was taken several years before in payment of goods sold and delivered in the regular course of business. It was considered as of some value, and with some prospect of the company's surviving its financial difficulties during the early part of the year in question and was kept on the books for that reason. Its deduction was properly allowed.

In the case of the Western & Hawaiian Investment Co., Ltd., the item is \$663.50, the deficiency on a note after foreclosing a mortgage. The note was given several years before but was considered collectible in July, 1902. The maker of the note had other property but apparently it was mortgaged to such an extent that it was not worth while to attempt to collect the balance of the note. The deduction was, in our opinion, properly allowed.

In the case of Castle & Cooke, Ltd., the item is \$26,233.19. This company had advanced cash, and sold machinery, supplies, etc., to the Hawaiian Automobile Co., Ltd., beginning in 1899. A note secured by mortgage was taken for the total amount, \$83721.80. During the year July 1, 1901, - June 30, 1902, \$30000 of this was written off as bad. The note and mortgage were considered good for the balance in July, 1902, but after foreclosure later in that year there remained a balance of \$26233.19. The deduction of this was properly allowed. Whether the deduction of \$30000 made the year before in the income tax return was proper, we need not say.

The decisions of the Tax Appeal Court are sustained except as to the item of \$43.40 in the case of C. Brewer & Co., Ltd., as to which the decision of that court is reversed.

W. A. Whiting and *C. F. Clemons* for the taxpayers in the first three cases.

Castle & Withington for the taxpayers in the last three cases.

ANE HILO v. LILIUOKALANI.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 12, 1904. DECIDED MARCH 26, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Foreclosure of a mortgage is barred, by analogy, by the statute of limitations applicable to real actions and not by that applicable to personal actions, and equity follows a reduction of the period applicable to actions at law.

Possession by the mortgagor and nonpayment of principal or interest for the period applicable to real actions after the debt falls due, raises a presumption that the debt has been paid and in the absence of proof of a recognition by the mortgagor of the mortgagee's claims within such period last past, the mortgagee cannot foreclose.

Foreclosure by entry is not completed until one year after entry and an attempt at foreclosure by entry, if unlawful, may within said year be enjoined as well as an attempt at foreclosure by sale before the sale is completed.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from a decree dismissing a bill for an injunction against the foreclosure of two mortgages.

One of these mortgages, on 3.7 acres of land covered by R. P. 2507, L. C. A. 11306, was executed December 9, 1878, by A. Kalama, plaintiff's predecessor in title, to W. Dean to secure the payment of a note for \$225. The other mortgage, on .67 of an acre of land covered by R. P. 3485, L. C. A. 8959, was executed March 6, 1879, by the plaintiff to F. M. Hatch, to secure the payment of a note for \$75. On July 20 and 21, 1881, respectively, these mortgages were assigned to the defendant.

The plaintiff contends, first, that the defendant agreed to pay the mortgages and not merely take assignments of them, and that the consideration for this was the conveyance to her by the plaintiff of another piece of land four months previously for a consideration of much less than the value of the land. The Circuit Judge found against this contention and we cannot say erroneously.

The next contention is that the foreclosure of the mortgage was barred by lapse of time. The notes secured by the mortgages, dated in 1878 and 1879 respectively, were for four years and one year respectively. Actions on the notes were of course barred long ago by the statute, there having been nothing to take them out of the statute or keep them alive. But that did not bar the remedy against the land. See *Campbell v. Kamaio-pili*, 3 Haw. 477; *Kaikainahaole v. Allen*, 14 Haw. 527. The remedy at law against the land, however, would be barred by the period applicable to real actions, and while, strictly speaking, the statute is not applicable to suits in equity, yet equity follows it by analogy; and where the statutory period is reduced, equity still follows the statute. 2 Jones, Mtgs., 2nd Ed., Secs. 1192-1196. The statutory period here for real actions was reduced from twenty to ten years before these attempts at foreclosure were made. These attempts were made, the one by entry under C. L., Sec. 1787, Subd. 2, on July 9, 1901, the other by advertisement of sale to take place August 31, 1901, under a power of sale contained in the mortgage. The periods from the time the notes fell due to the attempts at foreclosure were over eighteen and twenty-one years respectively.

To prevent foreclosure it was not necessary that the plaintiff mortgagor should have given notice to the defendant mortgagee that she claimed adversely. Mere lapse of time, the mortgagor being in possession, and nonpayment on account of interest or principal, in the absence of other recognition of the mortgagee's claims or rights, is sufficient to raise a presumption of payment after the lapse of the statutory period applicable to real actions. Jones, *supra*. The payment or giving of money, taro, pigs and

chickens by the plaintiff to the defendant does not appear to have been in recognition of the latter's claims or rights as mortgagee. Those payments and gifts were made by the plaintiff apparently as tenant of the piece of land which had been conveyed, as above stated, to the defendant and which she, the plaintiff, continued to occupy.

The defendant contends, however, that the bill cannot be maintained as to the first mortgage in any event, because that had already been foreclosed by entry before the institution of this suit, and that the plaintiff's remedy, if any, as to that was by redeeming within one year as provided by the statute or by action of ejectment. But in our opinion the mortgage had not been foreclosed. The foreclosure would not be complete until a year after entry and this suit was begun within two months after entry. The defendant does not claim to be in possession except under her entry for the purposes of foreclosure. She may be enjoined against continuing that attempt at foreclosure as well as against continuing the other attempt by sale.

The decree appealed from is reversed, and the case remanded to the Circuit Judge for such further proceedings as may be proper and consistent with this opinion.

J. A. Magoon and J. Lightfoot for plaintiff.

Robertson & Wilder for defendant.

TERRITORY OF HAWAII v. KIMURA.**EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.****SUBMITTED MARCH 9, 1904.****DECIDED MARCH 26, 1904.****FREAR, C.J., GALBRAITH AND PERRY, JJ.**

An exception to the verdict of a jury, in a criminal case, on the ground that it is contrary to the law and the evidence and against the weight of the evidence and one to an order denying a motion for a new trial based on the same ground are overruled, the verdict being found to be not contrary to the law and the evidence and not against the weight of the evidence.

OPINION OF THE COURT BY GALBRAITH, J.

The defendant is charged, by indictment, with the murder of one Kane Yamanaka, a Japanese woman, in the District of Waialua, Island of Oahu, Territory of Hawaii, on the 18th day of May, 1902. The jury returned a verdict of guilty of murder in the first degree and the Court sentenced him to be hanged by the neck until dead. The cause is brought to this Court by bill of exceptions.

There are only three exceptions set out in the bill. The first one was taken to the ruling of the court on an objection to a question on the ground that it was leading. The question asked a witness for the prosecution was, "Were you or were you not present when the doctor examined the body"? A. "I was not present." This exception is not well taken. In view of the answer the question was clearly immaterial and the exception seems to be frivolous.

The other exceptions present the same question in different

form. The objection was that the verdict was contrary to the law and the evidence and against the weight of the evidence. This question was urged first against the verdict and second as grounds for a motion for a new trial. The objection was overruled in each form. The consideration of these exceptions requires an examination of the evidence.

It appears from the evidence that the deceased for about a year prior to her death had been living with Yamanaka, a Japanese store-keeper, at Waialua, as his wife without having been married according to the laws of the Territory, although she had taken his name and that the defendant was in the employ of Yamanaka and had been in his service for a year past; that the 18th day of May, 1902, occurred on Sunday, and that the deceased and defendant, at about 2 o'clock in the afternoon drove away from Yamanaka's store in a one-horse cart, the former responding to an invitation of a neighbor, residing a few miles away, to attend a child's birthday party and the defendant was sent along as driver. The defendant while at the party imbibed rather freely of saki and became somewhat intoxicated. When ready to start home the deceased asked the defendant to permit Saito, whom she had met at the luau, to ride with them in the cart. The defendant refused, saying that three persons could not ride in the cart, whereupon the deceased declared that she would not ride but would walk with Saito and started off with him. The defendant drove on alone in the cart for a time and then waited for the deceased and Saito to come up to him, when he again insisted that the deceased should ride with him and when she refused he forced her into the cart and the two drove away in the direction of Yamanaka's. Fujikawa whose house is on the public road about one mile from Yamanaka's and between there and the place where the defendant compelled the deceased to get into the cart, testified that he heard loud talking in the road in front of his place about 9 o'clock p. m. and went to the door and saw the deceased and the defendant passing in the cart; that a few minutes later he heard the deceased cry out "help", "come and help"—and starting to go to her assistance

he heard a louder cry for help from the deceased, but was unable to catch up with the cart although he came near enough to recognize the deceased and the defendant in the cart; that he later secured a horse and pursued the cart and overtook it one half mile from Yamanaka's house and when he came up with it the defendant and the deceased were sitting up in the cart, the former holding the lines in his right hand and his left arm extended around the deceased, who was leaning on the defendant and when asked what the trouble was she made no reply but the defendant said the horse had been unmanageable. When the witness reminded the defendant that he was an experienced driver no reply was made. The witness then rode on to Yamanaka's and returned in a short time and met the driverless horse in the road and found the body of Kane Yamanaka doubled up in the cart. This was near ten o'clock at night. A doctor was called who upon examination pronounced her dead. The doctor testified at the trial that there was a deep cut across the throat of the deceased extending from ear to ear and that this was sufficient to cause death; that the wound was made with a sharp-edged instrument and was made by a strong thrust and could not have been self-inflicted.

The defendant was taken into custody a short time afterwards and the deputy sheriff who made the arrest said that the defendant was under the influence of liquor when arrested; that he asked the defendant "Why did you kill Yamanaka's wife?" and he said "I no care wahine no pololei, he and that wahine Yamanaka been before and today she ran away with a Japanese named Saito so he got mad and that is why he killed her." The defendant also gave the officer a blood-stained paper in his own hand-writing presumably the joint will of the deceased and the defendant in which the defendant admits the killing. The defendant had a gun when arrested and also had a cut on the neck that was probably made with a sharp-edged instrument.

The defendant being the only witness who testified in his behalf said in explanation of the death of the woman: "I and

the woman, two of us rode back in the wagon. On our way home she suggested to me that we could no longer live, and don't you think it is a good proposition for us to die now to-night. I told her that I would not die,—I don't like to die because I wanted to live for another two or three years. And she got out a knife and after whirling it around cut me on the hand. After I was cut here on the left hand I grabbed hold of the rein and then at that very instant I was bitten in the shoulder by her and at the point on the road leading to number three and about fifty feet away from that point we died." * * * "What I mean by 'we died' is this, that she cut herself in the neck and I cut myself in the neck." * * * "We were at that time on the wagon after she had stabbed herself in the wagon and after I had stabbed myself on the wagon I fell on the side of the wagon unconscious. I searched around for the knife with which I stabbed my neck attempting to make a second blow, a second stab, but the knife could not be found. I failing to find the knife went back to my own home where I found my gun and intended to commit suicide by shooting myself." * * * The defendant denied that he admitted to the officer, the night of arrest, that he had killed the deceased and also that he had written the "will" or written confession, given to the officer and admitted in evidence. This is virtually all of the evidence offered by the defendant.

In view of the confession and admissions and the uncontradicted testimony of the doctor to the effect that the wound on the deceased could not have been self-inflicted the theory of suicide is entitled to little if any credence. In the light of the evidence we cannot say that the verdict of the jury is contrary to the law or that it is against the evidence and the weight of the evidence. On the contrary the evidence amply supports the verdict.

There may be features of this case that will appeal to executive clemency; and constrain the Governor to commute the extreme penalty prescribed by the law for the crime of which the defendant was convicted, to one of a lesser degree but this

court in passing upon the exceptions presented cannot give effect to such considerations. The defendant appears to have had a fair and impartial trial. The evidence supports the verdict and the statute prescribes the penalty. The exceptions must be overruled. It is so ordered.

M. F. Prosser, Deputy Attorney General, for the Territory.
No brief for defendant.

In re THE QUEEN'S HOSPITAL.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED APRIL 5, 1904.

DECIDED APRIL 6, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The legislature may include in an appropriation bill passed at an extra session called under the provisions of Section 54 of the Organic Act an item which is not for a "necessary current expense of carrying on the government", provided the matter covered by the appropriation is one for which an appropriation may rightfully be made.

OPINION OF THE COURT BY PERRY, J.

The Queen's Hospital appeals from the refusal of the auditor to issue warrants, for the months of November and December, 1903, and January, 1904, for the monthly *pro rata* of the appropriation of \$10000 made for the Hospital by Act 10 of the extra session of 1903, and a similar appropriation of \$30000 made by Act 13 of the same session. The auditor moves to dismiss the appeal.

The only point presented by the motion is that it does not appear from the petition or statement of appeal that the appropriations of \$10000 and \$30000 are for a "necessary current ex-

pense of carrying on the government of the Territory of Hawaii or meeting its legal obligations." This is on the theory that §54 of the Organic Act limits the legislature, in extra session assembled, to the passage of bills making appropriations *for the necessary current expenses of the government*. The section, however, is not, in our opinion, to be so construed. The failure to pass appropriation bills of the class named is stated in the section as the condition for the Governor's calling the legislature in extra session, but, while Congress may have intended that the legislature should in such extra session appropriate for necessary current expenses, it did not intend that the legislature should not be at liberty to go further and appropriate other proper items not included within that designation. The object of the called session is not declared to be "for the consideration of *such* appropriation bills" but "for the consideration of appropriation bills" without any limitation whatever other than the implied one that the matters covered shall be rightful subjects of legislative appropriation.

The remaining points argued do not properly arise on this motion and will not be considered at this time. The motion is denied. The appeal itself is now in order for hearing.

Robertson & Wilder for appellant.

E. C. Peters, deputy attorney general, for the auditor.

IN RE ASSESSMENT OF TAXES, C. W. BOOTH.

APPEAL FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED FEBRUARY 29, 1904. DECIDED APRIL 13, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

If land with water rights appurtenant thereto and used solely in connection therewith, is assessed in full, including whatever added value it has by reason of such water rights when used solely in connection therewith, such water rights cannot be further assessed apart from the land, as to the whole or a part of their value, even if they may be worth more for other purposes than when used in connection with the lands to which they are appurtenant, and even if the land with such water rights might have been assessed higher because of the other purposes to which the water could be applied, and even if the water rights could be assessed separately if they had not been included in the land.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

The tax-payer returned nearly fifty pieces of kula, taro, pasture, vegetable, mountainous and residence lands in Pauoa, Honolulu. The assessor increased a number of the valuations. The Tax Appeal Court sustained some and not others of those increases. The assessor added a new item—"½ water rights Pauoa Valley, \$100,000", which the Tax Appeal Court disallowed, whereupon the assessor brought this appeal. The "½ water rights Pauoa Valley" consists of the aggregate of the water rights appurtenant to the lands, particularly the taro lands, returned as above mentioned, and of no other water

rights. The water comes from two springs, the site of one of which is owned by this tax-payer. The various lands supplied by one of the springs are respectively entitled to water during certain hours once in seven days and those supplied from the other spring are respectively entitled to water during certain hours once in nine days. The insertion of this item by the assessor was based mainly on the fact that this tax-payer and others, who were interested in the remaining third of the water rights in Panoa Valley, nearly succeeded in getting a bill through the legislature, a few months after the date as of which this assessment was made, appropriating \$150,000 for the purchase of all the water rights in the valley, the sites of these springs, rights of way for pipe lines, sites for reservoirs, etc., as an addition to the Honolulu water works and water supply. The reasoning was that if all were worth \$150,000, the appellee's two-thirds were worth \$100,000.

The tax-payer valued the lands as including these appurtenant water rights. The assessor assessed them as such. The Tax Appeal Court likewise fixed the values of such of the lands as were questioned on the appeal as including the water rights and said in its opinion that at the values fixed the tax-payer "is taxed fairly and even high."

Whether water rights that are solely appurtenant to and used in connection with particular lands may be assessed separately or not, it is unnecessary to say. No doubt such water rights may be more valuable for other purposes than for those to which they are applied, just as a town lot used as a pasture for the time being may be valued as suitable for agricultural or residence or business purposes. But when water rights are appurtenant to particular lands and used solely in connection with those lands and the lands are returned and assessed as including those rights, the latter cannot be further assessed separately for the surplus of value, if any, not so included, much less for their whole value.

There is perhaps another difficulty in the way of sustaining this assessment and that is that there is nothing to indicate what

surplus value, if any, of the water rights was not included in the assessment of the land. That the entire value of the water rights alone was not \$100,000 is clear. If we leave out of account the Governor's strong condemnation of the proposed bill in his veto message and other circumstances that tend to weaken the evidence adduced in support of the valuation contended for, and assume that all the evidence was not only admissible but entitled to consideration at its face value, still the proposed appropriation was not for the purchase, for \$100,000, of these two-thirds of the water rights, which were available only in small fractions on many different particular lands at many different fixed times, but was for the purchase, for \$150,000, of all the water rights with complete control and the power to use the water when and where and in what quantities desired, also for rights of way for pipe lines and for reservoir sites, and the sites of the springs, with the right to increase the outflow by tunneling or otherwise, and all for the purposes of the city water supply, to which use no private purchaser could put the water. The two thirds alone not being worth \$100,000 and there being no direct evidence showing what they were worth and a considerable portion at least of their value being included in the assessed value of the lands, it would be mostly guess-work to attempt to say how much or even whether any of their value was not included in that of the lands. But, however that may be, these rights cannot be assessed as to a portion of their value as part of the lands and as to the rest separately when they are all appurtenant to the lands and used solely in connection therewith.

The judgment of the Tax Appeal Court is affirmed.

Robertson & Wilder for the assessor.

J. A. Magoon and *J. Lightfoot* for the tax-payer.

CONCURRING OPINION OF PERRY, J.

The assessment of \$100,000 was based solely on the fact that the tax-payer offered to sell to the Territory his two thirds of the water rights for that sum and that a large number of the

legislators, both in the Senate and in the House of Representatives, voted in favor of the passage of a bill providing for the purchase of all the water rights for \$150,000. A number of reports or letters from experts, addressed to Booth and submitted to the legislature concerning the quantity and quality of the water in question and the altitude at which the springs are situated and a petition from citizens requesting the legislature to acquire the water rights for "such sum as shall be satisfactory" to the owners "and just to the government", received in evidence by the Tax Court, are also relied upon to a certain extent, but, assuming that they were admissible in evidence as admissions by Booth of those facts, they are of no practical value in the consideration of the inquiry as to the cash value of the rights.

Booth's offer to sell was not accepted by the Territory. It is immaterial in this connection that the bill failed to pass by one vote only. There was no agreement by the Territory to purchase for \$150,000 or for any other sum. That one offers to sell property at a certain price, while it may be strong evidence that the value of the property is not greater than the amount named, is at best extremely weak evidence that the value is as much as that amount. Owners often ask for their property more than it is reasonably worth, sometimes in good faith; but in the absence of an acceptance at the price named, the mere asking is not an indication of what the property will bring if sold.

The contention that the fact that certain members of the two legislative bodies voted in favor of the measure referred to is evidence of the opinions of those members that Booth's water rights, two thirds of the whole, were of the value of \$100,000, cannot be sustained. If the evidence showing the action of the legislators was admissible at all, the most that it shows is that those members were of the opinion that the rights, if *all* could be acquired so as to give the Territory the right to the *continuous* flow of *all* the water, were, together with the rights of way for pipe lines, etc., of the value of \$150,000; but this does not

tend to show that they were of the opinion that Booth's rights alone, which, as above shown, were not of a continuous flow, were of the value of \$100,000, even though, if they could be altered to a continuous right, they would be the equivalent, as to quantity of water, of two thirds of the whole. The evidence, however, was not, in my opinion, admissible. There was no opportunity for cross-examining the legislators. Upon what knowledge or information or facts were their opinions based? Were they based upon the opinions of others? What weight were the opinions of the members entitled to? Was the sum of \$150,000 named in the bill because that was believed to be the full cash value of the water rights or because, the full cash value being admittedly less, considerations of public policy were nevertheless deemed to justify or require the purchase? These are material questions with reference to which the legislators were not subjected to cross-examination.

There is no other evidence, nor is it even claimed that there is any, tending to show that Booth's water rights are of any value greater than that included in the valuation of the thirty-five parcels of land to which they are appurtenant. The Tax Court found that, tested by the full cash value, the assessments of those parcels, inclusive of the water rights, are fair and even high. Conjecture need not be resorted to in order to ascertain the correctness of that finding. Booth testified that the valuations returned by him were based on the rental value of the parcels as wet lands. Not only is that evidence undisputed, but the assessor himself testified that his assessments also were based on the revenue and productiveness of the lands as wet lands and on the value of neighboring property of the same character.

The opinion of the Chief Justice, except as modified in the foregoing, I concur in.

DISSENTING OPINION BY GALBRAITH, J.

It appears that there are numerous water springs near the head of Pauoa Valley but that the source of its principal water

supply is two particular springs: that one of these is located on the tax-payer's land and the other on the land of another but the tax-payer owns such an interest in the latter as gives him the ownership of two-thirds interest of the two springs: that the tax-payer also owns considerable land in Pauoa Valley which he returns for taxation at no higher valuation than the adjoining lands of others who claim no interest or right in these springs other than the common water rights appurtenant to their respective lands.

It is not denied that the taxpayer made a vigorous effort during the session of the Territorial legislature commencing on February 18, 1903, and closing April 28, 1903, to effect a sale of his rights in the water of these two springs for \$150,000, and would have succeeded in so doing but for the veto of the Governor and the failure to control the votes, lacking one, in the Senate necessary to pass the measure over the Governor's veto. In the absence of any evidence to the contrary the assessor had a right to assume that the tax-payer's interest in this water privilege was as valuable on the first day of January, 1904, as it was at the close of the legislative session in April prior thereto. Acting upon that presumption he had a right to place the valuation of \$100,000 on this property, the same valuation placed thereon by the tax-payer when he wanted to transfer it to the public.

The tax-payer's dominion over these two springs and the water flowing therefrom is property separate and distinct from the water rights appurtenant to the lands in the valley below. The latter right has no value except the use that may be made of it in connection with the land to which it is appurtenant. Therefore its value may properly be included in the assessment of the land. The property in the springs, however, has a specific value in itself. It is of great value for uses entirely independent of the cultivation of land, for instance, in supplying the community with water for domestic and other purposes and for this reason may be valuable as specific property for taxation purposes separate and apart from the land. The fact that such

use is possible in this instance, by reason of the location of the springs in close proximity to Honolulu and the pressing need for a suitable water supply for domestic purposes here, does not in the least lessen the value of the taxpayer's property in these springs.

The absurdity of the claim that the value of the property in these springs was estimated and included in the value of the land as approved by the Tax Appeal Court is apparent when it is remembered that the assessment includes many separate tracts of land, aggregating about sixty acres altogether, and the sum of the valuations is only \$43,750, less than one half of the value placed on the interest of the tax-payer in the water privilege alone. The assessor in my opinion, should be commended for taking the tax-payer seriously in his dealing with the Territory through its legislature, and holding that the property had the same value for taxation purposes as it was claimed to have by the taxpayer when offered for sale to the Territory.

This court ought to presume that the legislature, a co-ordinate branch of the government, was acting in good faith in dealing with this question and in expressing its willingness to purchase Mr. Booth's rights in the water privilege in the two springs, two thirds of which he claims to own and had a right to dispose of absolutely, for \$150,000 of the public fund. This court has no right to presume such perfidy on the part of the legislative assembly as the contention of the tax-payer implies.

What was this property or water privilege that the assessor has valued at \$100,000 and that is claimed by the tax-payer to be included in the value of his lands assessed at \$43,750?

The Senate committee having the bill in charge looking to the purchase of Mr. Booth's right in the springs, in their report to the Senate, among other things, say: "We have personally examined these springs and find from measurements made by several engineers that there are about 1,100,000 gallons of water flowing daily. This measurement was made in the latter part of the month of March, and the month previous to the month of

March have been very dry so the measurements made indicate the lowest flow obtainable from the springs."

The report of an engineer, presumably made at the instance of Mr. Booth, reads in part as follows: "Measurement taken at the mouth of two perpetual streams, the sources of which are two springs, at an elevation between 550 and 600 feet, situated in Pauoa Valley, about two miles mauka of the terminus of the Pacific Heights Railroad. The springs are not affected by the act of rain-fall, giving an output of 859,920 gallons in twenty-four hours, and by developing can be increased, by conservative estimate, to ten times this amount. Measurement taken from a stream at an elevation of 250 feet, in the same valley, lower down, the source of which stream is several small streams, gives an output of 253,700 gallons per twenty four hours. These springs are all located in Pauoa Valley, which is a natural watershed and would be a valuable reservoir site for the government."

The report of another engineer to Mr. Booth relative to the value of these springs, reads in part as follows: "1. From a close observation it is my opinion that the Pauoa springs represent but a very small portion of the underground flow, having its source in the interior of the island where a large area of permeable ground receives the copious rain-fall of that higher altitude which being filtered and collected in its passage to the lower levels a small portion of said flow is forced to the surface through favorable conditions occurring in the rock under the Pauoa Valley. 2. That the volume of the outflow of these springs can be greatly increased by proper development, say, tunneling, as has been clearly demonstrated by engineering experience in other localities where similar conditions exist. 3. That the fact that these springs are not affected by drouth or flood is evidence of their supply from a subterranean source. As to their desirability as a water supply for the city of Honolulu, I beg to submit the following:

"1. Purity of water as shown by medical analysis.

"2. They being at such an elevation (about 600 feet) above

the sea level, and such a short distance from the center of the city.

"3. The simple and inexpensive manner in which the water can be conveyed to a point available for distribution by a pipe line on the northerly slope of Tantalus Ridge without expensive trestle work or tunneling.

"4. Said water can be brought to a small reservoir on a point of the ridge, say 200 feet above Punchbowl Hill (the water to this point need not be conveyed under pressure) and dropped from this to a lower distributing reservoir, thus furnishing power to an electric plan before final utilization for domestic and other city purposes."

Among numerous witnesses certifying to the virtue and value of these springs are a number of physicians and surgeons, one of these says:

"Every city endeavors to put before its populace the best water available and Honolulu may be regarded as especially fortunate in this respect inasmuch as right above, say within two miles of the center and at an elevation covering the most important sections of the city, there is sufficient spring water of a purity impossible to excel and unaffected in quantity through the change of seasons. I refer to the Pauoa Springs, the medical analysis of which is attached herewith, subjected to direct bacteriological examination it reveals no pathognomonic bacterio or micro-organism. From a medical standpoint this water supply can be converted into an ideal system, and there is no doubt in my mind that the matter will meet with the approval of our legislators."

Aside from the probative force of the foregoing evidence, and much more to the same effect, tending to show the value of the right claimed in these two springs, the tax-payer by presenting and urging it before the legislative committees and the public gave it the additional weight of his approval and indorsement. So vigorously and persistently did he press the matter upon the attention of the legislature that the great majority of the people's representatives in the legislative assembly accepted his view of the desirability and value of his rights in these springs and the sale failed through a very slight margin. I must assume that Mr. Booth was acting in good faith with the legis-

lature and intended to give the Territory something of value for the expected one hundred and fifty thousand dollars and that his rights and privileges in these springs have the same value for taxation purposes that he represented them to have when he appeared before the legislature as a purveyor of them. By his conduct Mr. Booth has rendered it entirely unnecessary for this court to speculate or to attempt to apply some set rule to the facts in order to ascertain the "full cash value" of this property. We should assume that he placed the "full cash value" on it himself when he attempted to sell it to the Territory first for \$250,000 and later for \$150,000. Under the facts of this case the doctrine of estoppel, or common honesty, ought to close the mouth of the tax-payer and forbid him to question the valuation made of this property by the assessor.

It does not seem to me that Mr. Booth has any just cause of complaint if the same valuation is placed on his property for taxation purposes that he so persistently represented it to have when he wished to sell it to the Territory. Such a view is certainly in favor of public morality, if not of private virtue and common honesty.

It is clear to my mind that the rights and privileges owned by the tax-payer in the Pauoa Springs is of great value and that his lands as returned and approved by the Tax Court are not valued in excess of their true value, exclusive of his property in these springs, and that the assessor therefore had a right to assess the same, using the best information at his command, and that the valuation placed thereon, namely, \$142,750, ought to be sustained.

FRANK GODFREY as Trustee for Thomas Metcalf v. JOHN
KIDWELL.

MOTION FOR REHEARING.

SUBMITTED MARCH 2, 1904.

DECIDED APRIL 13, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The mere omission to notice in the opinion a certain point submitted is not good ground for a rehearing if the point was in fact considered by the court, particularly where its determination is necessarily involved in a determination of the other points which are referred to.

A rehearing will not be granted on the ground that the petitioner failed to argue certain points on the hearing.

The rule in equity as to transactions with "expectant heirs" does not apply in a case where the grantor's interest had become vested, accompanied with the right to immediate enjoyment, prior to the execution of the deed complained of.

In equity cases, on appeal, while the findings of the circuit judge are given weight and under certain circumstances, especially on pure issues of fact, would be allowed to control, the Supreme Court nevertheless is authorized and has always exercised its right and duty to weigh the evidence and to make its own findings.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

For a statement of the case on appeal see *ante*, p. 351. The complainant now moves for a rehearing on the following grounds: (1) that said decision of the Supreme Court is in conflict with former controlling decisions to which the attention

of said Court was not drawn; (2) that questions decisive of the case, and duly submitted by counsel, have been overlooked by the court in said decision; (3) that said decision is based upon mistake or misapprehension of the facts of the case apparent upon the record; (4) that many fraudulent acts, omissions and silence of defendant-appellant as appear of record render said decision against equity; (5) that said decision does not give due weight to the evidence in said cause and is not supported by the facts in the record; (6) that the special circumstances of the case; the fact, as appears of record, that the plaintiff was an ignorant young man without business training or experience, who had just arrived at majority, who was without disinterested or independent legal or other advice in the transaction at issue; that the consideration involved was hardly a fair one; that no error appears in the admission or rejection of testimony, that the cause appears to have been heard fairly and fully in the lower court, and that the judge thereof is the best judge of the evidence and the weight of the evidence and of the credibility of the witnesses; that the appeal in this Supreme Court was decided by a divided bench; and that the cause is one in equity, the policy of which is liberal,—render a petition for rehearing especially reasonable and worthy of favorable consideration.

1. Our attention has not, upon the hearing of this motion, either in the oral or in the written argument, been called to any controlling decision bearing upon any of the questions involved in the case. A number of cases from other jurisdictions not cited on the appeal, are now cited, but, while all are of value, none of them can in any correct sense be regarded as controlling, because, even if for no other reason, the principles declared by them are inapplicable to the facts of this case as we have found them.

2. It is contended that under this head may properly be discussed the court's failure to comment in its written opinion upon the case of *Irick v. Fulton*, 3 Gratt. (Va.) 193. The contention is clearly untenable. An authority cited is not a question submitted, within the meaning of the rule as to rehearings.

Referring, however, to the Virginia case cited and freely quoted from in complainant's brief and considered by us on the appeal, we find nothing in it that can lead to a rehearing. What the court there held was that by a deed which conveyed the *interest* of the grantor but which was "made under the belief of the parties that" the grantor "was entitled only to an undivided interest or share in said property, as one of the children and heirs of said Betty Haveley, the parties only sold and purchased and only intended to sell and purchase, such undivided interest," and that no more passed under the deed. That statement of the law it is unnecessary to question in this case. It does not apply to the facts as we have found them. Our finding was that the deed was not executed under a mistake as to the facts on the part of either party,—that while both doubtless supposed that in all probability the grantor's interest would prove to be not more than one half, still they speculated, knowing the deed to be operative to convey *all* the grantor's interest, whatever it might be, and took their chances as to all over as well as to all under one half.

It is difficult to ascertain from the oral argument or from the brief for complainant what other questions, if any, are claimed to have been submitted to and overlooked by the court. The following, perhaps, were intended to be made the subject of such claim: that there was a mutual mistake of fact and, hereunder, that Kidwell's alleged admissions in certain pleadings and other documents in two former cases in which he was a party show, any testimony of his to the contrary notwithstanding, that he believed at the time he received the deed that the grantor's interest was not more than one half and understood that that was all that the deed conveyed to him; that even where the mistake is that of one party only, without knowledge of such mistake and without fraud on the part of the other, equity may, under the peculiar circumstances of the case, grant relief; that while no one circumstance, as, for example, youth, inexperience, want of independent advice, ignorance of material facts, or inadequacy of consideration, may of itself be sufficient, per-

haps, to justify relief, still, when taken together, they are sufficient to require the intervention of equity. The first is a pure question of fact and was very carefully considered by the court on the appeal,—the court was divided on its conclusion upon the point. The second and third involve familiar rules of law, sought to be applied, however, by the complainant to a state of facts which the court found not to exist. All of the circumstances referred to, as well as the two rules of law, were considered by the court, whether they are expressly referred to in the prevailing opinions or not. Both points are by necessary implication, if not otherwise, disposed of by the decision. Moreover, the mere omission to touch upon a material point in the written opinion is not a good ground for a rehearing, provided the point was in fact considered by the court.

For the complainant the following contentions, also, are made and argued at length: (1) that even if there was not a mutual mistake of fact, there was at least such a mistake on one side and fraud (willful concealment of a material fact) on the other, or mistake on one side “accompanied by circumstances such as appeal peculiarly to a court of equity”; (2) that the evidence shows inadequacy of consideration so gross as to constitute *per se* ground for granting relief; (4) that the transaction was with an “expectant heir” and that, therefore, “mere inadequacy of price or compensation is sufficient to set aside the contract.” It is claimed that the court’s attention has not been hitherto drawn to any of these points. If this is so, the court’s failure, if any, to consider them, is not ground for a rehearing. In such case, they would simply be mere arguments based upon the same facts shown or claimed to be shown by the evidence. Counsel’s failure, if any, to advance them at the original hearing could not be taken advantage of to secure a further hearing. To hold otherwise would be to encourage the presentation of cases piecemeal. It may be added that with the exception of the fourth all of the points were presented in substance on the appeal, although not as elaborately as by present counsel, and were considered and disposed of by the findings and reasoning of the

court. The fourth point is new and is, apparently, that upon which the greatest reliance is placed. The rule contended for is that equity will set aside transactions in which expectant heirs have dealt with their expectations, when the court is satisfied that they have not been adequately protected against the pressure put upon them by their poverty; that mere inadequacy of price will entitle an expectant heir to set aside (on terms) the sale of a reversion; and that the purchaser is bound to establish the fact that the transaction was fair and the consideration given sufficient. *O'Rorke v. Bolingbroke*, L. R. 2 App. Cs. 814. The doctrine applies also to "reversioners and remaindermen, dealing with property already vested in them, but of which the enjoyment is future."—1 Story's Eq. Jur. §337. The rule does not apply in the case at bar, if for no other reason, because Thomas Metcalf was not an "expectant heir" at the date of the deed. The life-tenant, Frank Metcalf, had died prior to that time and not only had Thomas' interest become vested but he had the right to immediate enjoyment. He had then no "expectations" that had not been realized. All of this seems to be conceded by counsel for the complainant, but it is attempted to be met by the argument that "in the minds of the parties the vendor was without question, admittedly, an 'expectant'." This may be ingenious but it cannot bring the case within the rule. The principle and policy of the rule are at least open to doubt and a statute was long ago passed in England, where the doctrine originated, restricting its operation to a certain extent. The rule should certainly not be extended to cases not within its recognized limits.

3, 4 and 5. Under these heads the whole case has been practically reargued in all its possible phases as though a rehearing had been granted. Whether or not such reargument should be had is the precise point under consideration. Except as above stated, all of the issues of fact and of law suggested were fully considered by the court on the appeal. After a careful consideration of the elaborate arguments now presented we find no rea-

son for holding that manifest injustice has been done or for desiring a reargument.

6. The only additional ground urged is that this court did not give due weight to the decision of the circuit judge, and that "an appellate court sits, not to do original justice between the parties, but to determine whether the court below committed manifest and injurious error in its decree." That is not the rule in this jurisdiction. Equity cases come to this court, not on exceptions, but on general appeal, and while the findings of the circuit judge are given weight and under certain circumstances, especially on pure issues of fact, would be allowed to control, because he had the advantage of personally seeing and hearing the witnesses, this court nevertheless is authorized and has always exercised its right and duty to weigh the evidence and to make its own findings. See *Cha Fook et al. v. Lau Piu et al.*, 10 Haw. 308, 312, and *Tax Assessment Appeals*, 11 Haw. 235, 236. The court considered the question of the weight to be given the findings of the circuit judge in this case and was of the opinion that the circumstances were such as not to make them controlling.

The motion is denied.

W. A. Whiting and *C. F. Clemons* for complainant.

Robertson & Wilder for respondents.

DISSENTING OPINION OF GALBRAITH, J.

The grounds for the motion and the authorities cited in support thereof confirm my opinion that the decision of the majority of the court in this cause was and is erroneous. This opinion and the reasons therefor, set out *ante*, pp. 357, 358, 359, 360 and 361, are sufficient justification for my favoring a rehearing of the cause.

In re HAWAIIAN STAR NEWSPAPER ASSOCIATION,
LIMITED.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED APRIL 2, 1904.

DECIDED APRIL 13, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The Legislature failed at its regular session in 1903 to provide for the necessary expenses of the government for the succeeding biennial period. In its extra session immediately after, it passed complete appropriation bills for the first six months of the biennial period, and bills providing for a portion of the necessary expenses of the last eighteen months, but failed to provide for perhaps a half of the necessary expenses for those eighteen months on the supposition that those expenses would be borne by counties under an act which turned out to be void. Held,

That the expenses so unprovided for could be paid out of the last appropriation bills by the Treasurer with the advice of the Governor under section 54 of the Organic Act, and

That "the last appropriation bills," within the meaning of that section, were those of 1901 and not the six-months bills of 1903.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from a decision of the Auditor declining to issue a warrant on a voucher made out in the usual form and approved by the proper officers under the appropriation "incidentals tax office," for \$251.25 for certain printing and shipping expenses incurred in January, 1904, by the tax bureau. The ground of the refusal was that there was no such appropriation covering that period. The appellant contends, however, that this is a case in which, the legislature having failed

to make the required appropriation, "the Treasurer may, with the advice of the Governor, make such payments" under "the last appropriation bills", as provided in Section 54 of the Organic Act, which reads as follows:

"Sec. 54. That in case of failure of the legislature to pass appropriation bills providing for payments of the necessary current expenses of carrying on the government and meeting its legal obligations as the same are provided for by the then existing laws, the governor shall, upon the adjournment of the legislature, call it in extra session for the consideration of appropriation bills, and until the legislature shall have acted the treasurer may, with the advice of the governor, make such payments, for which purpose the sums appropriated in the last appropriation bills shall be deemed to have been reappropriated. And all legislative and other appropriations made prior to the date when this Act shall take effect, shall be available to the government of the Territory of Hawaii."

The legislature failed, at its regular session in 1903, to pass appropriation bills providing for payments of the necessary current expenses of carrying on the government and meeting its legal obligations as the same were provided for by the then existing laws, and, upon its adjournment, the Governor called it in extra session for the consideration of appropriation bills, as required by the section of the Organic Act just quoted. In extra session, the legislature, besides passing other appropriation bills which need not be further referred to, passed general bills, providing for salaries and expenses respectively, in the usual forms, for the biennial period July 1, 1903, June 30, 1905, but, in view of the fact that it had passed a comprehensive county act at its regular session, most of the provisions of which were to take effect January 4, 1904, it did not as usual pass one bill for salaries and one for expenses covering the whole biennial period, but passed such bills, known as the six-months bills, covering all necessary payments for the last half of 1903 and other similar bills, known as the eighteen-months bills, covering only the necessary expenses of the Territorial government outside of those intended to be borne by the proposed counties, for 1904 and the first half of 1905. The county

act was held invalid (*Territory v. Supervisors, ante*, p. 365) and, as already intimated, no appropriations had been made for the eighteen-months period for those of the necessary expenses of the Territorial government which were to have been transferred to the counties. The Treasurer thereupon decided, with the advice of the Governor, to meet such expenses out of the last appropriation bills,—which were deemed to be the previous six-months bills. It is not disputed that the expenses now in question were “necessary current expenses” within the meaning of Section 54 of the Organic Act.

Two questions arise: (1) Whether this is a case in which payments under the last appropriation bills can be made at all, in other words, whether it is a case in which the legislature has not “acted” within the meaning of this section of the Organic Act, and (2) whether, if it is such a case, the “last appropriation bills” are the six-months bills passed by the legislature of 1903 or the regular biennial appropriation bills passed by the preceding legislature in 1901.

The legislature undoubtedly “acted” at its extra session, for it passed a number of appropriation bills, and no doubt supposed that it had completely provided for carrying on the government for the succeeding biennial period. But did it “act” within the meaning of this section of the Organic Act? That the word “acted,” as used here, is not to be taken in a literal and restricted sense is clear. It must be construed. In a strict sense, the legislature would not only have acted but would have acted for the precise literal purpose for which it was called in extra session if it had merely “considered” appropriation bills, and, of course, if, besides considering them, it had actually voted on and rejected them. But no one would for a moment contend in such case that it had “acted” within the meaning of this law. It would seem to be almost as clear that it would not have so acted if it had passed appropriations for only one month or six months of the biennial period and omitted to make any appropriations at all for the remainder of the period, or if it had passed appropriations for one department of the govern-

ment for the whole period and omitted to pass any appropriations for any of the other departments. In the present instance it omitted to provide for perhaps a half of the necessary current expenses of the government for the last three-fourths of the biennial period. It omitted most of the appropriations required by certain departments and all those required by certain bureaus of the government for eighteen months.

The Organic Act contemplates appropriation bills for biennial periods. The regular sessions of the Legislature are biennial. Section 52 provides "that appropriations, except as otherwise herein provided, shall be made biennially by the legislature," and Section 53, "that the Governor shall submit to the legislature, at each regular session, estimates for appropriations for the succeeding biennial period." Then follows the section now in question. The failure to make the necessary provisions for carrying on the government would seem to mean for the biennial period. If any action whatever by the Legislature, however incomplete or inadequate, would preclude a resort to "the last appropriation bills," this section would be practically nugatory. Just what the full significance of the word "biennially" is, may be a matter of some doubt. If it means that every appropriation bill must cover a period of two years or that appropriation bills may be passed only once in two years, that is, at the regular session or the extra session immediately following the regular session, there would be extreme embarrassment. In such case most of the appropriation bills thus far passed by the Territorial Legislature might be void or the Legislature at its present special session might not be able to relieve the present financial situation at all by the passage of appropriation bills. This court has already held that the Legislature could divide the biennial period, by passing one set of bills for the time before the county act should take effect and another set for the time thereafter. *In re Boyd, ante*, p. 361. It may be that the word "biennially" in Section 52 was used, in part at least, with reference to the provisions of Section 54, in which case a failure to provide for a material portion of the biennial period or for a substantial

portion of the government, would clearly be a failure within the meaning of the latter section. These three sections are closely connected and are grouped under one subheading in the Organic Act and are adapted from certain sections in Article 70 of the Constitution of 1894. But, whether the construction of Section 54 may be affected by the construction of Section 52 or not, it is clear that its evident purpose requires us to hold that the Treasurer and Governor may, upon a failure of the Legislature to act, look to the last appropriation bills in order to meet the necessary current expenses of an essential portion of the government or for a material portion of the biennial period as well as for the entire government or the entire period.

This is not equivalent to holding that the Treasurer and Governor may supplement the action of the Legislature in the exercise of the legislative function of passing appropriation bills. Those officers do not make supplementary appropriations in cases of this kind. Congress has reappropriated for such cases appropriations already made by the Territorial Legislature. Those officers would no more legislate under circumstances like these than they would if the Legislature had failed to pass any appropriation bills. Whether those officers could make payments under the last appropriation bills in case the Legislature should intentionally omit a single appropriation as unnecessary without first specifically and independently repealing at its regular session the law, if any, for the execution of which a similar appropriation had been made by the preceding Legislature, it is unnecessary to say. It will be time enough to decide that question when it arises. In the present case it is clear that the Legislature omitted to a very large extent to provide for essential functions of the government and for three-fourths of the biennial period and further that it had no intention of doing so. Nor is a distinction made in this section between cases of deliberate or intentional failure or failure in bad faith or through incompetence and failure through oversight or accident. The object of this provision was not to punish the Legislature but to preserve the government and that too without unduly prolonged or nu-

merous sessions of the Legislature. It was not intended that the executive in the first instance or the judiciary in the second instance should pass upon the question of the good faith of a co-ordinate branch of the government. In this case of course it is not questioned by any one that the legislative branch acted in the utmost good faith and supposed that it had made full provision for carrying on the government. The failure arose in consequence of the invalidity of an act which was supposed to be valid. If that would prevent the operation of this section, the same result would follow in case the Legislature should fail to make any appropriation whatever in consequence of the invalidity of the appropriation bills themselves. As to the policy of calling a special session or looking to the last appropriation bills, or of looking to the latter until new bills should be passed in case a special session should be called, the court has nothing to do. It is true, this is an unusual provision, but that is no reason why it should not be given effect. It was deemed advisable by Congress to make it, as it was deemed advisable by the framers of the Constitution of 1894 to make somewhat similar provisions, in view of peculiar conditions. Congress, to be sure, although it extended the voting franchise further than did the constitution of 1894, did not deem it necessary to go so far in permitting the old appropriations to be used in the event of a failure to make new appropriations, for it gave the Legislature one more chance by providing for an extra session, but it deemed it wise to go as far as it did in this respect and it limited the length of both regular and special sessions of the Legislature more than did the constitution of 1894. The very fact that this is an unusual provision requires us to hold contrary to usual provisions elsewhere.

The remaining question is whether "the last appropriation bills" which "shall be deemed to have been reappropriated," within the meaning of Section 54 of the Organic Act, are the six-months bills of 1903 or the two-year bills of 1901.

If the Legislature were required to make complete provision, if any, for the entire biennial period, so that a mere partial pro-

vision should be deemed a total noncompliance with the statute, then both the six-months and the eighteen-months bills would be void and the appropriations of 1901 would be deemed reappropriated. But, in the view that we take, the appropriations of 1903—the six and eighteen-months bills—are good as far as they go, and “the last appropriation bills” may be resorted to in so far as the new bills are deficient. But it is only on the theory that the Legislature was required to provide for all the necessary expenses for the entire biennial period, that the last bills may be resorted to at all. The appropriations of 1901 were the ones to be deemed reappropriated until the Legislature should act and only such “sums appropriated in the last appropriation bills shall be deemed to have been reappropriated” as are necessary to supply the deficiencies, whether any new bills are passed or not. The new bills replace the old ones as far as they go. The sums reappropriated for necessary current expenses are the “last” ones with reference to the time spoken of, that is, until they are replaced and only in so far as they are not replaced by the new ones. There is nothing to indicate that the 1901 bills should be applied first and then that a shift should be made to new bills, if any should be passed, for periods not covered by new bills. The previous bills—1901 or other bills—apply to the corresponding times and purposes in the new biennial period, except in so far as they are replaced by the new bills. The contention that the new six-months bills are the last expression of the legislative will is, no doubt, entitled to much weight, but to this it may be replied, aside from the fact that the question with the court is one of law and not of policy, that these bills are the expression of the legislative will for a certain period only and not for the period now in question. They might have been for the second or third or last six months of the biennial period, but they could not in such case be applied to the first six months of that period; or they might have been complete as to the last six months of the year but not as to the first six months, or for the last six months of one year and not for the last six months of the other year of the biennial period, for there are some neces-

sary expenses that occur in only one-half of each year and some that occur only once in two years. Again, the section in question seems to contemplate only one reappropriation in the event named, that is, in the event of failure to make the necessary provision at the regular or extra session. If the six-months bills were the ones to be deemed reappropriated, they would have to be deemed reappropriated three times in order to complete the biennial period and that without the condition named happening more than once or happening at all at the time at which any of those three reappropriations would be deemed to be made. But if the 1901 bills are the ones to be deemed reappropriated, they may, in case of a similar failure at the next regular and extra sessions, be deemed to be reappropriated a second time, but in such case the condition named in the Organic Act would have happened again. The section in question provides what shall or may be done in case the Legislature in question fails to provide, and that is not to repeat, perhaps several times, what it did provide but to supply its failure by what had previously been provided for the time or expenses corresponding to those not provided for by the Legislature in question. What Congress might have done if it had contemplated the present particular status, it is impossible to say. There are other possible combinations of circumstances more embarrassing than these, but Congress made a broad provision that could be applied to all situations and did not attempt to provide what might perhaps be the very best under each particular situation that might arise. In this particular case or perhaps in any cases that have arisen thus far, it may make little practical difference whether the six-months bills of 1903 or the two-year bills of 1901 are deemed reappropriated to supply the failures for the present biennial period, but, as we construe the Organic Act, the sums appropriated in 1901 are the ones to be drawn upon in the present case.

The wording of the appropriation in either the six-months bill or that of 1901 answers the purposes of the voucher now in question, and if this were all that is required, the appeal would

have to be sustained. But as the appropriation for 1901 can be drawn upon only by the Treasurer with the advice of the Governor, and as neither of those officers has been shown to have sanctioned such action, the appeal must be dismissed, but without prejudice.

It is so ordered.

Deputy Attorney General E. C. Peters for the appellant.

Holmes & Stanley for the Auditor.

OPINION BY GALBRAITH, J.

The questions presented by this appeal, seem to be, at this time, more academic than practical, since the legislature is now in special session, having been convened by the Governor for the purpose of enacting financial legislation, and is indicating an earnest desire to provide by proper appropriation for any and all existing deficiencies however occasioned.

I might be content with this statement were it not for the fact that the decision of the majority of the Court gives a construction to Section 54 of the Organic Act that is so wide of my views of the proper construction of that section that not even "the peculiar conditions", that are said to exist in this Territory, will justify me in passing the question without giving, at least, some of the reasons for my views.

The conclusion announced in the majority opinion can only be arrived at from the view-point that the legislature is not a co-ordinate branch of the Territorial Government but is subordinate and subject to the domination of the Executive or the Judiciary.

The Organic Act divides the territorial government into three branches, namely, "the legislature", "the executive" and "judiciary". Each of these is supposed to be equal and co-ordinate. No one is placed above the other. The duties of each are prescribed in the Organic Law, and each is responsible for a failure or dereliction of duty not to one of the others but to the authority calling it into being, namely, the Executive and the Judiciary to the President of the United States and the legislature to

the people of the Territory who elected them. Neither the Executive nor the Judiciary has any more right or authority to do the work of the legislature when it fails from any cause to do it than the legislature has to perform the duties of the Executive or the Judiciary under like circumstances. The Organic Law does not vest in any one of the coordinate branches of the government any supervisory power over the other.

The power of the legislature extends to "all rightful subjects of legislation". The appropriation of money "for payment of the necessary current expenses of carrying on the government and meeting its legal obligations as the same are provided by the then existing laws", is a rightful subject of legislation. This power includes not only the authority to appropriate money to pay all current running expenses of the government but also the right to determine what shall constitute such "necessary expenses". It follows that whatever authority determines the amount and character of the "necessary current expenses" of the government performs a legislative function.

The foregoing is important in this connection as throwing light on the proper construction to be given Section 54 and also as showing what Congress did not intend by that section. And taken in connection with Section 43, authorizing the Governor to convene the legislature in special session", at any time, without limitation, successfully refutes the imputation that there was a belief or feeling in Congress that the legislature of this Territory could not be fully entrusted with legislative power and that the object of Section 54 was "to preserve the government and that too without unduly prolonged or numerous sessions of the legislature."

The facts to my mind lead clearly to the contrary conclusion. Congress gave to the legislature by the Organic law power over "all rightful subjects of legislation," within the limits of that law and the Constitution of the United States, and provided for regular *biennial sessions* of the legislature, for *extra sessions* and for *special sessions*, at any time the Governor might convene them. If Congress did not intend to provide for *numerous*

sessions of the Territorial legislature in this territory the provisions for "*extra sessions*" and for "*special sessions*" are useless and meaningless.

To hold that Congress intended by Section 54 to authorize the Treasurer on the advice of the Governor to make payment of the current running expenses of the Government out of the "last appropriation bills", whatever they may be, under the circumstances of this case, is not only to do violence to the language of the section itself but is also to ignore an intention clearly expressed in every other part of the Organic Act, namely, that the legislature should be an integral and coordinate part of the government of this territory. Such a construction renders the legislature a useless luxury and not a necessary constituent part of the Government. If such had been the intention of Congress no provision for a legislature would have been made in the Organic Act. A code of laws would have been adopted for us and the Treasurer and Governor would have been authorized to make the needful appropriations. This is clearly what wisdom with such a purpose in view would have directed to be done and I believe that Congress having the best interest of the people of the Territory at heart, as it has, would have pursued such a course if it had been prompted by the intention imputed to it in the construction given this section.

The opinion of the Court gives to Section 54 the same meaning that would be given to Section 4, Art. 70 of the Constitution of the Republic of Hawaii, from which it is said to have been taken. This provision of the late Constitution reads:

"In case of a failure of the Legislature to pass appropriation bills providing for payments of the necessary current expenses of carrying on the government, and meeting its legal obligations, the Minister of Finance may, with the advice of the Executive Council, make payments for and during the new biennial period, for which purpose the sums appropriated in the last appropriation bill shall be deemed to have been re-appropriated."

There is a similarity between the language of this provision and that of Section 54, still there is a broad difference between them and to hold that the two provisions mean one and the same

thing and authorize the exercise of the same power is clearly erroneous.

The most important distinction between the provisions of the two sections is that fixing or limiting the time within which the extraordinary powers therein prescribed may be exercised by the executive officers therein named. The limitations in Section 4, is that the payments may be made "for and during the new biennial period". This provision is unambiguous and its meaning easily understood. This provision was omitted from Section 54, and another inserted in lieu thereof, namely, "and until the legislature shall have acted the Treasury may", etc. Why this change was made or what the phrase means is involved in no little doubt.

If we assume that Congress intended by this section to confer on the Treasurer and the Governor of the Territory the same power that the Constitution conferred on the Minister of Finance and the Executive Council of the Republic of Hawaii, why should the language be changed and why substitute an ambiguous phrase for one that is clear? It seems to me that the only answer to these questions is that Congress intended to restrict the use of the power therein conferred, whatever that was, to a less time than "for and during the new biennial period", namely, "until the legislature shall have acted". This phrase certainly indicates a belief on the part of Congress that the legislature would act and an intention, at most, to make provision for a possible emergency that might arise between the time of calling an extra session and the time when the legislature "shall have acted".

When the legislature at the extra session made provision by proper appropriations for every necessary current expense of the Territory for the first six months of the ensuing biennial period, the time fixed in the section within which the Treasurer and Governor might draw on the "last appropriation bills" expired, if such power ever existed. The legislature had then *acted* within every proper meaning that term. The power was gone. The occasion prescribed for calling it into existence had

passed and could not possibly recur again until after the adjournment of another regular session of the legislature without having passed the necessary appropriation bills. The section is certainly not automatic. It does not place a lever in the hands of the Treasurer by working which he is enabled, at will, to spring into activity or to suppress into quietude the power claimed for this section or authorize him, whenever an appropriation has been exhausted, or a "necessary current expense" left unprovided for, to declare that the legislature "failed to act" and proceed, on the advice of the Governor, to draw on the "last appropriation bills."

An interpretation that gives to this statute such unusual authority is far fetched and unwarranted. We might expect to find such a provision as Section 54, in the Organic law of a semi-civilized people but not in the law prepared for a people adjudged capable of self-government and particularly in an Organic Act that goes to the extreme of liberality in granting to the people control over their own local affairs. This section is out of place in such a law and does not seem to answer any necessary purpose therein.

It should not be construed to authorize the Treasurer and Governor to make the appropriations for the reasons above given and it should not be construed to reappropriate money for the reason that it lacks one of the essential features of such a statute, namely, certainty. The Governor and the Treasurer thought that one set of appropriation bills were reappropriated and proceeded to make payments therefrom. Now this court decides that they were mistaken and that another and different set of appropriations should have been drawn against.

The legislature adjourned in May, 1903, and the "necessity" for these appropriations arose on January 1, 1904, still no one will be able to tell what money was reappropriated by this self-acting automatic Section 54, until the decision in this case is filed. If the use of these appropriations has been so "absolutely essential" to the preservation of the Territorial Government, as is contended, the poor old territory would have been done for

long before the decision in this case is filed for that is as early as it could be known with certainty which were the "last appropriation bills." As a matter of fact we know that the territory has not gone into insolvency, that she is still performing her useful functions, that life and property are as safe here now as at any former time and that her efficiency has not been perceptibly impaired and none of the employees have voluntarily relinquished their offices for the reason that the legislature "failed to act" in making proper appropriations to pay the expense of the same.

It is suggested that some calamity threatens the territory if this section should be held nugatory and that the construction placed upon it is necessary to the preservation of the territorial government. The fear and the claim are equally imaginary and unfounded. The Organic law of this territory has now been in force for almost four years and only one time during this period has any attempt been made to obtain relief from the power claimed for this section and this attempt was an utter failure or at least the imagined relief was not essential for the Territorial Government was preserved without the relief that this section was supposed to afford:

Another fatal objection to the construction given this section is that under it a governor, who might be so disposed, could by failure to sign or return the appropriation bills sent him within ten days of the adjournment of the session, and most appropriation bills go to the Governor within this time, defeat their becoming law and fall back on the "last appropriation bills" on the claim that the legislature had "failed to act." In other words it would give the Governor the power to choose between the appropriations bills of the extra session or those of a former session—"the last appropriation bills." I have too high a regard for the wisdom of the United States Congress to believe that it would be possessed of an intention to give the Governor and Treasurer of a Territory of the United States, such arbitrary power over the public revenues.

The account of the petitioner is no doubt a just claim against

the Territory and one that ought to be paid but it cannot be paid until the legislature makes an appropriation for that purpose and until such time the Auditor may rightfully refuse to issue a warrant for it. The appeal should be dismissed.

In re ASSESSMENT OF TAXES, JOHN II ESTATE,
LIMITED.

APPEAL FROM TAX APPEAL COURT, HONOLULU.

SUBMITTED FEBRUARY 29, 1904. DECIDED APRIL 14, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A granted to B for a term of years, at an annual rental of \$8000, the right to enter upon three certain parcels of land, to dig tunnels and ditches, to construct dams, reservoirs, flumes, pipe-lines and electrical and other power works and to take all water found and which might thereafter be found on the lands named. The lessee used the land in accordance with the rights so granted. The lessor returned one of the tracts as exempt from taxation under C.L., §897, claiming that it was fenced and that cattle were excluded therefrom. Held, that such tract was not exempt, as "other use" was made of it.

Where the language of a memorandum of assessment is ambiguous, the construction placed upon it by the parties before the Tax Appeal Court and by that court itself will prevail.

OPINION OF THE COURT BY FREAR, C.J.

(Perry, J., dissenting.)

The facts are sufficiently set forth in the dissenting opinion of Mr. Justice Perry.

As to whether the assessment is on the forest land or on the water privilege alone we think it must be taken to be on the for-

mer, as the wording is to some extent ambiguous and both parties proceeded before the Tax Appeal Court on the theory that the assessment was on the land and the decision of that court is based on that theory, although there are other papers in the case pointing in the other direction.

In our opinion the forest land is not within the exempting statute, assuming that that statute is still in force, not because the appellant has leased certain rights in this land along with other lands, but because other use is actually made of this land under that lease.

The lease of the water privilege was made in 1899 at an annual rental of \$8,000. The assessment of the forest land is \$64,000—estimated on the eight-year rental rule, but this lease and rental is of all three tracts, the 8000 and 836-acre pasture tracts and this 5000-acre forest tract, and the evidence shows that by reason of this rental the assessments of the two pasture tracts were raised the year before from \$44,180 to \$83,360, and the year before that the assessment of the 8000-acre tract was raised from \$24,000 to \$40,000. The assessment of the forest land was raised the year before that now in question from \$7,500 to \$12,500 and the year before that from \$5,000 to \$7,500. Thus not only should the value due to the lease be distributed among the three lands which it covers, and perhaps the better way would be to assess all three lands as a whole, but there is much reason to believe that at least a part of that value is included in the assessments of the two pasture tracts—what part is included in the pasture tracts and what part should be included in the forest tract, it is impossible to say. Under these circumstances we think that the most that can be done is to place the valuation of the forest land at the amount at which the Tax Appeal Court placed it the year before on the evidence then produced, there being nothing to show that the value has changed meanwhile.

It is so ordered.

Robertson & Wilder for the assessor.

J. A. Magoon and *J. Lightfoot* for the tax-payer.

DISSENTING OPINION OF PERRY, J.

The tax-payer returned for the year 1903 the following three items, among others :

"R. P. 5732. L. C. A. 8241. 8000 acres. Kula. Ahupuaa of John Ii—pasture and water right. \$80,000.

"Grant 6. 836 acres. Kula. Waikakalaua. do do." (meaning "pasture and water rights") \$ 8,360.

"R. P. 5732. L. C. A. 8241. 5000 acres. Forest.

Ahupuaa John Ii (exempted as a Forest Reservation under Chapter 61, Civil Laws 1897)" The assessor accepted the first and second items as returned, made blue-pencil marks against the third and added, later in the return, an item as follows: "Water Priv. Waipio. For. Land. Annual Rent, 8000. Lessee, Oahu Sugar Co. \$64000." On June 30, 1903, the assessor wrote the tax-payer: "In accordance with Act 36, of the Session Laws of 1898, you will please take notice that your property is assessed as follows: * * * Water Privileges, Waipio For. Land leased to Oahu Sugar Co., \$64000." The certificate of appeal, dated July 20, 1903, and signed by the assessor (the notice of appeal is not with the files), certifies "that Jno. Ii Estate by J. A. Magoon, Esq., of this District, is assessed for the year 1903 as follows: Value Real Estate, \$144000. * * * That he disputes the following items of such assessment, viz: Real Property, \$64000. * * * And has duly appealed from such assessment. * * *" At the hearing before the tax appeal court both parties proceeded on the assumption that the assessment of \$64000 was on the 5000 acres of forest land claimed by the tax-payer to be exempt (counsel for the Ii Estate stated, however, that he felt doubtful as to the real meaning or intent of the assessment). Just how the tax court regarded the matter is not entirely clear. In its written decision sustaining the assessment, it described the subject of the appeal as "5000 acres Ahupuaa of John Ii at Waipio, Ewa, returned exempt as a forest reservation and assessed at \$64000", but in the certificate, made in conformity with the requirement of §886, C.L., the appeal is said to be "from the decision * * * sustaining the valuation and assessment of the Tax Assessor, in his assessment against the John Ii Estate, Limited, as follows: Ahupuaa of John Ii (pasture land and water right) valuation \$80000, assessed by the assessor \$80000.

“Water privilege for Waipio for land leased to Oahu Sugar Company, assessed \$64000, returned by owner nothing.

“Taxes payable by the John Li Estate, Limited, increased \$640 beyond the amount which would have been payable according to the owner’s return.”

The appellant contends that the assessment of \$64000 was upon the whole water privilege leased to the Oahu Sugar Company and not upon the forest land and therefore can not stand, on the ground that a separate assessment of water rights as such is not permissible under our statutes. The assessor, on the other hand, contends that the assessment was upon the forest land. The statute, C.L., §854, as amended by Act 36, Laws of 1898, contemplates that ordinarily assessments shall be made before the first day of July of each year. The assessment in this case was made before July 1, 1903, as is shown by the notification to the tax-payer above referred to. What the parties have said and done since the making of the assessment, simply serves to show the construction which they at the time placed upon the original memorandum or entry of assessment noted on the return. The presumption is that the same entry was made in the tax books or lists. There has been no amendment to the original assessment. In my opinion, the language used is not capable of the construction contended for by the assessor. The assessment is on the “water privilege” as such and not on the forest land. If the latter had been intended, the valuation would naturally have been placed against the item of 5000 acres as returned although this consideration, if it stood alone, would not be conclusive. As late as June 30, 1903, as shown by the letter of that date, the assessment was construed by the assessor himself as being on the “water privilege” and nothing to the contrary is to be found in his certificate of July 20. The water privilege assessed would seem, further, to have been that only to which the forest land is made subject by the lease, but this particular point need not be definitely decided for, as will appear later, it does not materially affect the result.

The lease relied upon by the assessor to sustain his valuation grants to the Oahu Sugar Co. for the period of 58 years from

March 31, 1899, for an annual rent of \$8000, the right at all times during the term "to enter upon and to pass over all lands now belonging to or controlled by the party of the first part, situated in the District of Ewa, Island of Oahu (including the Ahupuaa of Waipio) which are situated above 650 feet above sea level; that is to say, all lands mauka of the lands heretofore held by the party of the second part under lease from the party of the first part; and to bore, dig, tunnel and explore for water in any manner on said premises; and also to construct and maintain all such dams, reservoirs and other works for the obtaining, developing or storing of water as to the party of the second part may seem expedient; and also to construct and maintain upon, over or through said premises all such wells, ditches, tunnels, flumes, pipe lines, bridges and conduits for the taking and carrying away of said water as to the party of the second part may seem best; and also to take, convey away and use all water found upon the premises hereinabove referred to, and also all water which may hereafter be obtained upon said premises, in consequence of the operations of the party of the second part or otherwise, except as below reserved; to or upon all or any lands now or hereafter in the possession or under the control of the party of the second part for irrigation and domestic purposes and to generate electrical and other power and to construct power works for such purposes on the lands of the party of the first part above referred to, and to conduct such power over lands of the party of the first part for use only however on the premises of the party of the second part for the manufacture of sugar and other purposes incidental thereto, with the full right to first store and impound such water or not as the party of the second part may see fit; and also to construct all such works and to do all acts in such number, manner and location as to the party of the second part may seem best; and also to have and enjoy all such roads and right of way as may be necessary for any of the above purposes; and also to take and use for such purposes such soil and rock upon said premises as may be necessary." Both the 8000 acres of pasture land and the 5000 acres of forest land, as well as the

836-acre piece for the remainder at least of the term of a certain lease of it formerly held by the II Estate, are subjected to the rights so granted. By the terms of the instrument it is expressly agreed "that said party of the second part shall hold harmless and indemnify the said party of the first part for all loss or damage that it may sustain by reason of claims of riparian owners on account of the taking or diverting all or any portion of the water as hereinabove provided",—in other words no water rights are granted other than those belonging to the lessor.

Rights such as those granted by this lease are taxable property. If held in fee, they are land and real property within the meaning of Section 818 of the Civil Laws; a reversionary interest in them would come under the same class, while a leasehold interest is personal property within the meaning of Section 819. It may be that under some circumstances such rights may be separately taxed, as, for example, where they are held in fee by one who owns no other land; but in the case at bar the lessor's interest in them may not, in my opinion, be so taxed. In the first place, they are leased and used by the lessor jointly with the three lands out of which they were granted and are not in fact or within the meaning of §820 an item of land distinct from the remainder of the land. Secondly, their value, as will appear later, has been already included very largely, if not wholly, in the return and assessment of the 8000 acres and the 836 acres.

The claim that the 5000-acre tract of land is exempt under Chapter 61 of the C. L. (Section 897) can not be sustained, even assuming that the provisions of that chapter are unrepealed and in force. Section 897 reads as follows:

"In all cases where forest land is fenced for the purpose of protecting the forest or springs or streams of water rising on said premises or flowing through the same, and all live stock are excluded from the same, and no other use of such lands or its products is made, such land, so long as such conditions exist, shall be exempt from taxation.

"In order to secure such exemption, the person claiming it shall, annually between the first and thirty-first days of July make a sworn statement to the local Tax Assessor describing

the land in detail and setting forth the facts upon which the exemption is claimed, including an agreement that in consideration of the exemption from taxes he will during the year next succeeding keep such land properly fenced, will not allow any live stock upon it, and will not use such land or its products during such year without first paying the taxes thereon."

The land in question does not come within the class designated by this section because, while it has been fenced and all live stock has been excluded from it, other use is being made of it. The lease authorizes the digging of tunnels and ditches and the construction of dams, reservoirs, flumes, pipe lines, bridges and other works for the obtaining, developing, storing and taking away of all water found and which may hereafter be obtained on the land and the powers granted have been, the evidence shows, utilized by the lessee in some if not in all of these respects. By implication the lessee is also authorized, so far as may be necessary to the enjoyment of the rights, to destroy portions of the growing forest not only by cutting in order to dig ditches and reservoirs but also by damming and impounding water in narrow gulches or other suitable places. Again, the lessee may construct on the land works for the generating of electrical and other power. The object of the statute, as stated in the preamble, is to preserve forests and thus increase the water supply. Some if not all of these enumerated uses are inconsistent with the attainment of that object, and none of them, other than the fencing and exclusion of stock, in furtherance of it. It was not the intention of the legislature to exempt from taxation land, such as this, put to uses yielding a substantial income but merely to exempt lands set apart by the owners for the public purpose, and no other, of preserving the forests and the springs and streams of water thereon.

As to values. The express words of the return show that the earning capacity of the 8000 acres and of the 836 acres as disclosed by the lease was considered by the appellant in fixing the valuations of \$80000 and \$8360 respectively. The tax court in view of that earning capacity had sustained assessments for 1902 at those figures and in the return now under consideration

the appellant had simply adopted the same valuation. The assessor accepted them, and then committed the error of taxing the whole water privilege, as he terms it, in a separate item at an additional valuation of \$64000, the sum of eight years' rental. This, if allowed to stand, would clearly be duplicate taxation. If that part of the leased rights arising out of the 5000 acres was not considered in determining the earning capacity of the 8836 acres or in fixing the valuation of the latter, it may be so considered with reference to the 5000 acres; but it cannot contribute to the value of both tracts.*

The forest land is of but little if any value aside from such as is given to it by the water to be found within it. The 8000 acres and the 836 acres are pasture lands producing an annual income of \$1000. The present annual rent or income from all three lands, including that derived under the lease, is \$9000. Aside from the income-producing capacity and from the fact that the owner returned the two pasture lands for 1903 at \$88360, that the forest land, now claimed to be exempt, was valued by the tax court in 1902 at \$12500 and that no appeal from that valuation was taken by the owner, no evidence whatever has been adduced by either party tending to show the full cash value of the three lands. If the eight-year rental rule were applied, the resulting aggregate valuation would be \$72000. This must be controlled, however, by the admitted values of \$80000 for the 8000 acres, \$8360 for the 836 acres and \$12500 for the 5000 acres. The total valuation of the three tracts of land, considering also the rights reserved under the lease, should not, upon the evidence now before the court, be more than \$100860. This serves to strengthen the conclusion that in the item of \$64000 there is duplicate taxation, for with it the three lands are valued in all at \$152360.

Owing to the indivisible nature of the rights leased, it is impossible to say what portion of the \$8000 rent is earned by and should be attributed to the 5000 acres, what to the 8000 acres and what to the 836 acres. All three tracts, should, I think, be assessed together in the absence, at least, of any change in the

conditions, the rent reserved under the lease as well as all other income derived from them being material elements to be considered in determining their value. The forest land has not yet been assessed. It is not for this court to assess it in the first instance. In view of the fact that it is impossible to ascertain just how far the rights granted out of it have been already permitted to contribute to the valuation of the other items, care should be taken in assessing it that no duplicate taxation results. The assessment should be such that the aggregate of the assessments on the three lands shall not exceed their total cash value.

The appeal should be sustained, the decision of the tax court reversed and the assessment of \$64000 on the "water privilege" set aside. The assessor should now assess the 5000 acres of forest land.

PALOLO LAND & IMPROVEMENT COMPANY, LIMITED, *v.* WONG QUAI, WONG CHOW, LUM SOW, WONG MUNG, TERRITORY OF HAWAII, ESTATE OF CHARLES LONG, LILIUOKALANI, HAWAIIAN TRAMWAYS CO., LTD., T. H. DAVIES & CO., LTD., W. R. CASTLE, A. F. COOKE, S. K. KANE, KAUCHA (k), KALOKI (w), HAUIA (w), W. H. PAIN, KAAUI (w), KAOPULAUOHU (k), KEAKA NAIWI (k), NOA (k), NAHOLOWAA (k), LILIUOKALANI, as lessee of the Territory of Hawaii, J. H. BOYD, as lessee of the Territory of Hawaii, W. E. ROWELL, as lessee of the Estate of Charles Long, LOO CHIT SAM, as lessee of Palolo Land & Improvement Co., Ltd., of Liliuokalani, of

W. R. Castle, and of Hauia (w), WONG TUCK, as lessee of Palolo Land & Improvement Co., Ltd., of Haui (w), and of Keaka Naiwi, WONG YOU KEE CO., as lessee of Estate of Charles Long, of Kaloki (w), of Liliuokalani, and the Territory of Hawaii, S. K. Kane, as lessee of Kaauui (w), WING OIE, as lessee of S. K. Kane, KUM CHING, as lessee of Kaopulaohu, WONG LUNG, as lessee of Noa (k), KAUHA, as lessee of Estate of K. Kanoa, WONG OIE AH YORK, as lessee of Estate of Charles Long, KUM LUI, as lessee of Palolo Land & Improvement Co., Ltd., OUI, as lessee of Palolo Land & Improvement Co., Ltd., and NAEOLE.

APPEAL FROM COMMISSIONER OF PRIVATE WAYS AND WATER RIGHTS, HONOLULU.

SUBMITTED MAY 29, 1903.

DECIDED APRIL 16, 1903.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A prescriptive right to water for a certain tract of kula land held not to exist, as the use relied upon is shown by the evidence not to have been hostile or continuous for the statutory period.

Water may be diverted by the owner from land entitled thereto to other land of his, provided no injury is thereby done to others. But where the overflow from certain taro land from which such diversion is sought to be made belongs by prescription to lower lands adjoining, only as much water may be diverted as is consumed on the servient land itself in the cultivation of taro.

Certain of the water rights of Palolo Valley defined.

OPINION OF THE COURT BY PERRY, J.

This is a proceeding brought in the early part of 1902 before the Commissioner for the settlement of water rights in Palolo Valley, Oahu. It involves the rights of all the wet lands in that valley. The hearing before the Commissioner occupied parts of

twenty-five days, thirty-seven witnesses being examined, the transcript of whose testimony covers 828 typewritten pages. In addition to this, the notes of the evidence taken in three former suits concerning some of these same rights were introduced and admitted as evidence in this case. The Commissioner filed her decision on November 20, 1902, and a supplement thereto on December 6, 1902. From that decision certain of the defendants appealed to this court.

The Commissioner seems to have met with much difficulty in ascertaining what the ancient rights were and how far they had been modified by adverse user in later years and in finding a method for the enforcement of those rights and finally concluded that "the matter is left entirely in the hands of the Commissioner to make a distribution in as equitable a manner as possible, with a due regard to undoubted ancient rights wherever proved, and also with a view of protecting capital invested in industries tending to the welfare and prosperity of the community." If by this was meant that the distribution was to be in conformity with vested rights and otherwise just and equitable, the rule laid down was correct. That is what the statute (C.L., Sec. 1823) and justice require. If anything less than that was intended, the theory of the decision was incorrect. In either event, it becomes our duty to determine whether the specific adjudications made by the Commissioner should, upon the law and the evidence, be sustained, reversed or modified.

Those adjudications are as follows:

"First. I adjudge one half of the water at the present Dam 1 (called Mahoe on the map) to Wailupe (auwai) the present continuation of said Wailupe to Dam 1 to remain.

"Dam 4 to be discontinued, but the auwai formerly leading from said Dam 4 to be kept open immediately below position of dam, to take whatever seepage should drain from waters of Mahoe and Kolihana kuleanas that would flow naturally that way, and carry the same to junction with present Wailupe auwai. This auwai though must not take any water directly from the stream.

"Wailupe ditch to irrigate first Mahoe, Kolihana and two-

acre piece marked F on the map, then such of lower Kalaepohaku as is now cultivated, Kahuaia and Keaweolono, then Ka-ululoa apana two, Kepuhi, Wailupe and its kuleanas, Kaauwaeloa 1 and 2, and lastly Kapahulu and its kuleanas formerly entitled to water.

"At the boundary stone wall between Kaauwaeloa and Kapahulu water should be so divided that only what is necessary to irrigate the three acres of Wong You Kee Co. be allowed to run to it, the rest of the residue of Wailupe water, say one half, to be turned on to Kapahulu to be impartially divided between lois formerly entitled to it.

"Kapahulu is to have the right to dig a trench below the three acre land of Wong You Kee Co. and take whatever surplus water or drainage is found thereon to Kapahulu-loko-pa or land that formerly had a water right.

"Dam 2 known as Kahamano to take one half of water found in Pukele stream at that point. The water of this auwai irrigates mostly land of Kaulu, in Waiomao and kuleanas therein, surplus and drainage flowing naturally into Waiomao stream.

"Dam 3 for Auwai-o-Humu to take one half the water of Pukele stream at that point which should be increased by seepage from Mahoe kuleana and the upper stretch of Kahamanoauwai. The waters of Humu are to be used to irrigate all kuleanas and lands having water rights in it above the reservoir, and as the most of the lands entitled to such water belong to the Palolo Land and Improvement Co. they may continue to take surplus water into said reservoir, providing the lands above get all the water necessary for the healthy growth of their crops.

"Dam 4 to be done away with.

"Dam 5 for auwai of Piilani to take one half the water of stream at dam.

"Dam 6 for Auwai-o-Kapuhi to take one half the water of stream at that point. Water of said auwai to irrigate land of Kukeanuenue and lower Kepuhi and Wailupe. Flume crossing stream to be taken away.

"Dam 7 to be rebuilt and water of same taken to lower part of Kukeanuenue, lower Kepuhi and Wailupe. To take one half water of stream at dam.

"Dams of Kukekia and Hapuna to be rebuilt and to take one half water of stream at each dam. Water is for lower Kaauwaeloa and Kapahulu.

"Laauli, Dam 9, to take all the balance of water in the stream

for Kapahulu, as there is no cultivation below Kapahulu-loko-Pa.

“On Waiomao stream, Dams A and B, also kuleana Opunui, apana two, may take all the water they want as they must flow back into stream afterwards, there being no other outlet.

“Dam C for auwai of Kaulu irrigating land of Kaulu in Waiomao to take one half of water of stream at dam. All drainage from land watered by this auwai falling back into stream above Dam D, Kaneohuku.

“Dam D, Kaneohuku, irrigating Kekio and its kuleanas, to take two thirds of the water of Waiomao stream at that point.

“Dam 8 for Keaunaia auwai, irrigating land of Keaunaia, a part of Kekio, and kuleanas in Kekio bordering on main stream to be moved further up from present location onto the Waiomao stream at a point just before its junction with Pukele stream and where it cannot take up water flowing through Pukele stream. Dam 8 to take up balance of water in Waiomao stream with all seepage and drainage falling naturally into that stream above junction with Pukele.

“Waters of Kaneohuku and Keaunaia auwais to be used on ancient cultivated land of Kekio and its kuleanas with water rights first, and only surplus water can be used on the newly cultivated land called Pukakohekohe, the twenty-four acres former kula land.

“All kuleanas to have all needed water, and drainage from them must be into adjoining land, or back into stream.

“Water of seepage and springs in Mahoe and Kolihana kuleanas adjudged to Wailupe ditch in second paragraph of first section is hereby more definitely defined as all water flowing or seeping from all the makai side of a large bank running from the present Waialae corner of the large Mahoe loi (and now enclosed by a barb wire fence) to the Pukele stream. Said embankment meeting at a point a little above or mauka of Humu dam.

“This embankment is also the old trail leading from the mauka Honolulu side of Palolo Valley to the Waiomao side of Pukele stream.

“Parties interested are requested to take immediate steps for the proper identification and establishing of permanent marks or monuments defining boundaries of seepage waters referred to in above paragraph, to the end that as many interested parties

as possible may see and know of it now while Commissioner is alive and here to appeal to.

"Dam D, Kaneohuku, may take all the water of Waiomao stream until such time as parties interested may build the Keaunaia dam on Waiomao stream above junction with Pukele stream. Kuleanas entitled to water to draw from Dam D in the meantime.

"This decision is final on all issues raised, but nevertheless any of the defendants herein owning kuleanas may apply on or before the first of June, 1903, to have a definite sub-apportionment of water awarded to him or her from the auwai water to his or her kuleana.

"Any rebuilding of dams shall be done by all parties interested, expenses to be borne in proportion to the water awarded or claimed.

"Should stone and cement dams be wanted to be built next summer such permanent improvements should be borne by land owners proportionally to the amount of water entitled to, except in case of mutual agreement between landlord and tenants."

The wet lands of Palolo obtain their water from two streams, the Pukele on the west and the Waiomao on the east, which come together at a point a little above the middle of the cultivated portion of the valley. In rainy seasons, the two streams perhaps carry about equal quantities of water, but the flow of the Pukele is at other times much greater and is more constant than that of the Waiomao, this being due largely to the fact that certain springs on the Mahoe kuleana, the uppermost taro land on that side of the valley, flow into the Pukele, partly because the water-shed of the latter is larger and partly, perhaps, because the bed of the Waiomao does not retain water as well. In dry seasons, the supply from the Waiomao is very much less than that from the Pukele.

The total area of land now using water is, approximately, 140 acres, of which a tract of 24 acres is claimed not to possess any right to water. Of the remainder about 58 acres lies west of the Pukele, in a long narrow strip, about 29 acres between the two streams and about 29 acres east of the Pukele below its junction with the Waiomao.

Across the two streams, at points approximately indicated

on the map by M. D. Monsarrat marked Exhibit X, are fifteen dams. An important element for determination in this case is as to the proportion of water that may lawfully be diverted from the main stream at each of these dams. Other questions are as to what rights, ancient or prescriptive, the 24-acre piece has and what rights, if any, have accrued by prescription to a certain reservoir built by one Philip Milton, in the upper portion of the valley and between the two streams.

As to the 24-acre piece. For purposes of future identification it may be said that this tract, now, cultivated in rice, is situated east of the easterly road running into the valley and makai of the bend of that road passing in front of D. W. Pauahi's residence. There can be no doubt that this tract was until some time in the early eighties rocky, uncultivated kula with no water rights appurtenant to it. In 1882 or 1883, after Milton became the owner of that and other portions of the valley, clearing of the piece from the builders upon it and cultivation in rice commenced. The water for that purpose was originally obtained partly from the surplus diverted at Kaneohuku dam but mainly from the reservoir already referred to and which was built by Milton in or about the year 1884. The reservoir in turn was supplied from Ditch 3 and, to a lesser extent, by overflow from Ditch 2. Such use of the water as was had by the twenty-four acres, was not continuous, not even during all of the time when it was needed. In times of plenty, when the wet lands had all they needed, no complaint, perhaps, was made of the taking by the lower tract; but whenever the use by the 24-acre piece or by the reservoir would, if permitted, result in the other lands having less than they needed, complaints did follow as also an interruption in the use now claimed to have been adverse. Until the institution of these proceedings Milton and his successors in ownership recognized, and their attorney so advised them, that neither the 24-acre piece nor the reservoir had any right to water except by transfer from Kaululoa, a wet land situate mauka of the reservoir and not in cultivation for some years

next succeeding the building of the reservoir, and that they must yield to the complaining natives. In consequence of the objections of the owners above and of the resulting lack of water, for three or four years past water for this piece has been at times obtained by purchase from the Pahoa water works, a source outside of the valley. Not to mention other lesser interruptions, the land remained untilled from 1891 to 1893 or 1894. One Akana, who had taken a lease of the tract in 1890 and who commenced planting during a wet season, abandoned the land and surrendered his lease the following year when he discovered that he had no substantial water rights sufficient to irrigate the tract and for that reason only. Upon all of the evidence, we are satisfied that the use relied upon by the plaintiff, the present owner, lacked the elements of hostility and continuity and find that the tract had no ancient rights to water and has acquired none by prescription. Concerning the transfer to it of water appurtenant to other lands of the plaintiff, we shall speak hereafter.

The reservoir, costing about \$8,000, was built by Milton after he had consulted counsel as to his rights in the matter. His attorney advised him, in substance, that his only right was to divert water from his unused land of upper Kaululoa but that even as to that, a different or new use, the consent of the other owners of wet lands in that vicinity would be necessary. Milton at that time held under lease the land of the heirs of one Long, which heirs he did not consult, but obtained the consent of the other owners interested to his taking into the reservoir by night the water from Kaululoa and kuleanas in the vicinity, the other parties to use the water by day. The arrangement, however, seems to have been intended to be of a temporary character only and to have reference merely to water not needed by the other owners. The attorney referred to, a credible witness, who was familiar at the time with all the details of the matters in question, testified that he did not then understand that any of the other owners were by reason of the consent given, whatever it was, surrendering any of their rights to water their own lands

and from the other evidence, which is practically undisputed, it is clear that Milton and Cartwright, his successor in interest who conveyed in 1899 to A. F. Cooke, the grantor of the plaintiff, at all times recognized as superior the rights of the wet lands in the valley whether situated above or below the reservoir. Whenever the lessees of the 24-acre piece, for the use of which alone the reservoir was built and continued in existence, did attempt to use water at times of an insufficient supply so as to result in any of the other lands not having all that they needed, complaint was made and the reservoir and the 24-acre piece yielded until finally for use at such times water from Pahoa was purchased. Upon all of the evidence we are satisfied that the use relied upon by the plaintiff was permissive at its inception and continued permissive until at least the conveyance to the plaintiff's grantor in 1899 and that no prescriptive right to water to which other lands were theretofore entitled has accrued in favor of the reservoir.

To the taking by the reservoir of surplus water, meaning thereby freshet water and water not needed by any of the wet lands elsewhere in the valley to the extent to which it has been taken in the past in the existing ditches or as overflow from them, no objection is made by the appellants, as they expressly say in their brief. In the absence of a controversy and of a contest and argument, we do not care to express any opinion on the point. It is of some importance, as a precedent at least. The question of the taking of any portion of such surplus greater than that mentioned is, of course, not before us.

As to the diversion of the water of the unused portions of Kaululoa to the reservoir or to the 24-acre piece, the view has been adopted that water may in such cases be diverted provided no injury is thereby done to others. *Peck v. Bailey*, 8 Haw. 658 (1867) and *Lonoaea et al. v. Wailuku Sugar Co. et al.*, 9 Haw. 651 (1895). We think that the plaintiff may lawfully divert the water to which any unused portion of Kaululoa is entitled, but the qualification to the rule, an essential qualification, requires us to say that this does not mean that all the water flow-

ing to or over such portions may be taken but only as much as would be consumed on the land itself in the cultivation of taro,—in other words, in the application of this ruling care must be taken not to divert any more water than can be diverted without causing injury to others. The distinction here sought to be made is material because, as we find from the evidence, the waters passing by seepage and overflow to adjoining lands and subsequently into one or the other of the main streams are, especially in the dry seasons, a real and an important part of the supply for such adjoining lands and for other lower lands and are a part of the supply to which such dominant lands are entitled. Just what proportion of the water from such unused lands the plaintiff may divert, we do not now venture to say, for there is before us no sufficient evidence for the purpose. The parties interested may be able to satisfactorily adjust the matter if a diversion is desired, but if it becomes necessary the Commissioner and this court will later determine the point.

Some question seems to have been raised during the taking of the testimony below as to whether a three-acre piece in the southern portion of Kaauwaeloa and a three-acre piece just west of the stone wall in Kapahulu are entitled to water. As to the first of these, the question was disposed of in *Loo Chit Sam et al. v. Wong Kim*, L. 1699 (5 Haw. 130, 200), where it was held both by the Commissioner and the Supreme Court on appeal that the land was ancient taro land and entitled to water. The Commissioner's decision "that all the land now under cultivation by Wong Kim is entitled to water from the Wailupe ditch" would seem to cover the second piece also for from the evidence in this case it appears that that piece was being cultivated by Wong Kim at the time of that decision. However that may be, and whether the land was originally taro land or not, it is clear from the evidence, which is undisputed on the point, that the land has now acquired a right to water by adverse use for more than ten years next preceding the institution of these proceedings. Such use commenced, if not before, very soon after the decision of 1884 just mentioned.

Dams 1, 2, 3 and 4. In October, 1883, one Loo Chit Sam and seven other Chinese composing the firm of Mau Yick Wai Co., Bila, Noa, Ku and Pauahi brought a suit against Wong Kim before the Water Commissioners for the settlement of certain water rights then in controversy between them. Wong Kim was cultivating lands west of the Pukele now cultivated by the appellants under the same lessors and the Mau Yick Wai Co. was cultivating lands east of the Pukele now held by the plaintiff. One of the questions then involved was as to the division of the water of the Pukele at and above Wailupe Dam (No. 4). The commissioners rendered a decision containing eight subdivisions or orders, but six of these were by the Supreme Court on appeal held to be too vague and indefinite to be of any value as decisions and the case was remitted to the commissioners for determination. The second and third points, conceded by the appellant, Wong Kim, when before the Supreme Court to be correct and by that court affirmed, were as follows:

"2. That the new ditch dug by Wong Kim from the spring in the taro patch on Mahoe's kuleana to the Wailupe ditch be done away with and the overflow from this patch to run into the stream.

"3. Open the head of the Wailupe ditch that has been closed up." The commissioners thereafter further decided as follows:

"1. That the 4 auwais, viz.: that watering Mahoe's patches, Waiomao, Pukele and Wailupe are each entitled to $\frac{1}{4}$ of the water from the main stream or water-head.

"2. That the overflow from those of Mahoe's patches facing west should flow into Wailupe, that from the rest into the stream." From these adjudications no appeal was noted.

While the decision in that suit would be binding on all who were parties and on their privies, it is not binding on others. Wong Kim alone was made a party defendant and no attempt was made to bind others by service by publication. Yet the decision should be given effect as far as possible, for it was rendered at a time when more kamaaina testimony was available. A serious difficulty, however, presents itself concerning a portion of the decision, and that is, in ascertaining what was intended by the award of one fourth to what the commissioners call the

Pukele Auwai. The evidence thus far given, whether in the former cases or in that at bar, discloses no auwai by that name. Three of those referred to by the commissioners are easily identified (the Waiomao being that here called the Kahamano), but the only other one testified to in this case as existing in that vicinity is the Humu (No. 3), a ditch which, upon all the evidence, is much smaller than the others. All of the witnesses in the former case who testified on the subject said, in effect, that the correct division was $\frac{1}{4}$ each to Mahoe, Kahamano and Wailupe and $\frac{1}{4}$ to go down the main stream, the Pukele. A diagram filed as an exhibit in that case is entirely silent as to the existence of the Humu. The commissioners in their decision say that "the evidence is perfectly clear and requires no comment." All this would seem to indicate that by the "Pukele" the commissioners meant the stream and not the ditch. On the other hand, pointing the other way, is the fact that the commissioners doubtless knew the difference between an "auwai" and a "main stream" and the fact that all of the witnesses on the subject (in the present case) speak of the Humu, small though it may be, as an old ditch with some kuleanas and other lands dependent upon it. We find no reason in the evidence for supposing or finding that the Humu sprang into existence after the decision of 1884.

Upon all of the evidence, bearing in mind the relative areas to be watered and the other circumstances, we think that the rights of the parties will be best preserved and justice effected by awarding to the Humu one eighth of the quantity of water in the Pukele stream just before it reaches Mahoe dam, all the surplus needed elsewhere in the valley by any of the wet lands to pass either by way of seepage or as overflow, from the lands watered by the Humu either directly or indirectly into the Pukele (and partly into the Waiomao stream if the natural lay of the land so requires) or to lower lands entitled to water, but not to be diverted by the reservoir except as already provided above. Thus will be left to the main stream and dams below Wailupe dam the remaining one eighth and all seepage and overflow re-

turned to the Pukele above Wailupe Dam and the seepage and overflow entering the Pukele above Piilani from Kaululoa and upper kuleanas. The seepage and overflow from Kahamano to these lands just mentioned must take the same course. The great preponderance, if not all, of the kamaaina testimony in this and in previous cases shows that the award made in 1884 of $\frac{1}{4}$ each to the Mahoe, Kahamano and Wailupe auwais is correct and should be sustained together with the accompanying orders that the new ditch in the Mahoe kuleana be closed and that the head of Wailupe ditch be opened, and also that relating to the overflow from Mahoe's patches, whether, we now add, the latter be cultivated or not cultivated.

Why the former order that the new ditch just referred to be closed and that Wailupe be opened has not been complied with up to the present time, does not appear; but no contention is made by the appellants that any prescriptive rights have accrued from such disregard of the order. The appellants apparently regard it as immaterial to themselves whether the Wailupe ditch gets all its water at Mahoe Dam or partly there and partly at Wailupe Dam.

The contention of the appellants that, if the new ditch be ordered closed, they should be permitted to cement the ditch from Dam No. 1 so as to carry off all water not strictly the product of the alleged "springs" in Mahoe kuleana cannot be upheld. It is inconsistent with the rule so strongly and rightfully contended for by them, as to all other parts of the valley, that all surplus, whether appearing as seepage or as overflow, should be permitted to pass down for the benefit of lower lands.

Dams 5, 6, 7, 8, Kukekia and Iiapuna are each entitled, we have no hesitation in holding, to take $\frac{1}{2}$ of the water in the stream at the points where they are respectively located, Keaunaia (No. 8), as well as each of the others, to be continued in the place where it now stands. Laauli (No. 9), there being no other dam below it, may take of the water remaining in the stream at that point as much as the ancient taro lands watered

by that dam and ditch need, the overflow, if any, to be returned into the stream.

The Commissioner was correct in ordering the discontinuance of the use of a flume across the Pukele between Dams 6 and 7 and leading water from Kapuhi ditch at a point in the lele of Kaululoa to the lands on the eastern side of the Pukele. No right, either ancient or prescriptive, exists for the maintenance of a flume at that point.

The decision of the Commissioner as to Dams A and B, on the Waiomao, is affirmed. Kaulu dam (C), on the same stream is entitled to $\frac{1}{2}$ of the water in the stream at that point but whether the seepage and surplus from the lands directly watered by it should return into the Waiomao above Kaneohuku Dam (D), as ordered by the Commissioner, or should pass to adjacent lands and thence partly to each of the two streams, as contended by the appellant, is not clear. The contention is that in a former suit (*Ing Choy v. Ung Sing Co.*, L. 3089, 8 Haw. 498), it was held that the lower lands adjacent were entitled to such seepage and overflow, but from the record in the case referred to, as it stands, it is impossible to identify the lands of Ing Choy in whose favor the decision was rendered and the evidence in this case concerning the original rights is not satisfactory. As to this point the commissioner's decision is unsupported by the evidence and is set aside. No ruling upon it is made by us.

Kaneohuku Dam (D) has been the most fruitful source of controversy in the valley, but, although it has been directly or indirectly involved in at least two proceedings before the commissioners (*Ahoi v. Loo Chit Sam*, 1882, L. 1150, and *Loo Chit Sam et al. v. Wong Kim*, 1884, L. 1699), no definite adjudication has yet been made as to the proportion of water which it is entitled to take from the stream. The order of the commissioners in L. 1699, points 6, 7 and 8, has been already held by the Supreme Court to be ineffective as a decision because too vague and upon the case being remanded no further attempt was made to determine the point. Paragraphs 6, 7 and 8 were as follows: "(6) that a part of the dam in the auwai from Waiomao

be taken away so as to allow the proper amount of water (according to the ancient division) to come through the auwai to the Pukele stream; (7) that the Keaunaia dam be lowered or opened so as to allow the upper proportion of water according to the ancient division to pass down the stream to Kukekia dam; (8) that the water be taken out at the Kukekia dam to water patches in Kaauwaeloa adjoining the stream and patches or land below on the northwest side of stream. The division of the water to be according to the ancient water days." These are of value, however, as tending to show the conclusion of the commissioners, reached after hearing more kamaaina testimony than is now directly available, that Kaneohuku, as also Keaunaia, was entitled to a part only of the water. There is, further, a decision in *Ahoi v. Loo Chit Sam*, to the effect that Kapahulu is entitled to 48 hours each week and that Keaunaia "be lowered evenly right across at least one foot", the intention evidently being, as an inspection of the whole record will show, to hold that Kapahulu is entitled for that time to all the water at Dam 9 including water from Waiomao. The present plaintiff claims all of the water of the Waiomao at Kaneohuku and this was practically granted to it by the Commissioner in awarding to that dam $\frac{2}{3}$ of the water at that point, in ordering Keaunaia moved to a point on the Waiomao above the junction with the Pukele and in awarding to that dam as so placed *all* of the water in the stream. We are satisfied upon the evidence that each of the dams below the junction is entitled to water from the Waiomao as well as from the Pukele. This ancient rule is a just one, for thus the lands on each side of the stream below the junction receive a portion of the lesser and more variable flow from the Waiomao and a portion of the greater and more constant flow from the Pukele. Moreover, a part of the water in the Waiomao at and below Kaneohuku originally comes, as above shown, from the Pukele, finding its way across through the Kahamano, the Humu and the Piilani auwais. The rule elsewhere in the valley, except at the headwaters, is that each dam takes one half. We know of no reason why this should not apply to Kaneohuku and

the preponderance of the evidence is to the effect that that is the ancient division. The lands on the east obtain at Keaunaia another one half of the Pukele water at that point.

The Commissioner's order concerning the allowance to the three-acre piece in Kapahulu outside of the stone wall and the surplus therefrom we find no reason for disturbing.

Throughout the valley all seepage and overflow needed on wet lands below should be permitted to flow on the adjoining wet lands or into one or the other of the streams, directly or indirectly.

Except as in this opinion is otherwise directed, the Commissioner's decision as to what lands are to be watered by each auwai is affirmed.

On some lesser points involved in the controversy no decision was rendered by the Commissioner, as, for instance, as to the division of the water from each auwai among the lands dependent upon it. The Commissioner reserved ruling upon these matters until the next dry season when this portion of the work can be more successfully done.

A decree will be entered in conformity with the foregoing, without prejudice as to any of the matters left undetermined. Costs to date to be paid, one third by the plaintiff, one third by Loo Chit Sam, one sixth by the Wong You Kee Company and one sixth by the lessors of the latter other than kuleana holders and the Territory of Hawaii.

T. McCants Stewart and *L. Andrews* for petitioner.

Kinney, McClanahan & Bigelow and *C. S. Dole* for respondents appellant.

T. K. LALAKEA v. THE HILO SUGAR COMPANY,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED FEBRUARY 1, 1904. DECIDED APRIL 19, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An unrecorded chattel mortgage is not valid or binding to the detriment of third parties.

The registry of a chattel mortgage not entitled to be recorded is a nullity.

Actual knowledge of the existence of a chattel mortgage is not a substitute for recording.

It is a prerequisite to the valid registry of a chattel mortgage that the acknowledging officer endorse on such mortgage a certificate of the fact of acknowledgment.

A certificate that on a day named "personally appeared before me Chan Choon and Sing Kee, known to me to be the persons described in, and who executed the foregoing instrument, who executed the same freely and voluntarily and for the uses and purposes therein set forth", does not state the fact of acknowledgment and is for that reason insufficient and invalid.

Testimony of the acknowledging officer to the effect that the parties did in fact acknowledge before him the execution of the instrument can not cure the defect and is inadmissible to aid the certificate and to support the validity of the registry and mortgage.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

Kanehoa (w), the owner of 4.36 acres of land described in R. P. 953, on May 10, 1898, leased to one Sing Kee a portion of the same containing an area of three acres for the period of ten

years from June 1, 1898. On August 18, 1899, Sing Kee and one Chan Choon, the latter evidently a partner, executed to one W. D. Schmidt, to secure payment of a note for \$250, a mortgage of the cane growing upon the three acre tract, which mortgage was recorded on August 21, 1899. On December 14, 1899, Chan Choon who, it seems, had acquired all of Sing Kee's interest in the land and cane, gave T. K. Lalakea, the plaintiff, a mortgage on his interest in the land and on the growing cane as security for a note for \$300. Chan Choon abandoned the premises and left the Territory in August, 1900, and has not been heard of since by the lessors. At the time of the abandonment, six months rent was due and unpaid. One Kapu, who had acquired the land by deed from Kanehoa in 1899, entered and took possession in September, 1900, claiming a forfeiture of the lease, and on the 28th of the same month executed to the plaintiff a lease of the same land for the term of five years from the first of October following. The plaintiff also claims that on the 27th of September he entered and took possession under the provision of his mortgage authorizing such entry in the event of the mortgagee's having reason to fear that the security was in danger of becoming lessened or taken for distress for rent. Schmidt, without entering, foreclosed his mortgage by publication of notice, commencing with September 22, 1900, and sale, the latter taking place on October 13, 1900. The defendant claims to have bought the cane from the purchaser at this foreclosure sale. The present action is for the value of the cane so taken by the defendant, the plaintiff alleging in his declaration that the cane was sold and delivered by him to the defendant. The judgment for the defendant was based wholly upon the view that the Schmidt mortgage and the foreclosure proceedings thereunder were valid and that the defendant acquired title to the cane not from the plaintiff but through the foreclosure sale.

Plaintiff's exceptions present a number of questions concerning the validity of the Schmidt mortgage and of the foreclosure proceedings, but of these one only need be considered and that is whether the mortgage was legally recorded.

"To entitle any conveyance or other instrument to be recorded, it shall be acknowledged by the party * * * executing the same, before the Registrar of Conveyances, or his agent, or some judge of a Court of Record, or notary public of this Territory, or some notary public or judge of a Court of Record in any foreign country. * * *"—C.L., §1839. This description of the class of instruments to which the provision is intended to apply is so clear that we shall not attempt any improvement of it. It applies to the chattel mortgage under consideration as well as to any deed or other instrument. But not only must an instrument be acknowledged before it can be lawfully recorded but it must also be endorsed with a certificate of such acknowledgment signed by the officer who took it. "Every officer who shall take the acknowledgment or proof of *any* instrument" (again the description plainly including chattel mortgages), "shall endorse a certificate thereof, signed by himself, on the instrument."—C.L., §1847. "*Every conveyance or other instrument, stamped and acknowledged or proved, and certified in the manner hereinbefore prescribed, by any of the officers before named, may be read in evidence without further proof thereof, and shall be entitled to be recorded.*"—C.L., §1848.

What are the requirements of a valid certificate of acknowledgment? One requisite, the only one that need be here considered, is that it shall state *the fact of acknowledgment*. Sec. 1831 which provides that "the certificate of acknowledgment shall state the fact of acknowledgment" may be assumed to refer only to instruments affecting real estate, as is contended by the defendant. Sec. 1847 (Sec. 1257 of the Civil Code of 1859) contains substantially the same provision in its requirement that "every officer who shall take the acknowledgment or proof of *any* instrument, shall endorse a certificate *thereof*, signed by himself, on the instrument." This section beyond question applies to chattel mortgages as well as to other instruments. The language is not less clear as to what it is that shall be certified to. It is the fact that acknowledgment or proof, as the case may be, was made to the officer. The use of the word "thereof" shows this.

The certificate of acknowledgment endorsed on the Schmidt mortgage reads as follows: "Republic of Hawaii, Island of Hawaii, ss. On this 18th day of August, A. D. 1899, personally appeared before me Chan Choon and Sing Kee, known to me to be the persons described in, and who executed the foregoing instrument who executed the same freely and voluntarily and for the uses and purposes therein set forth." (Signed) "W. S. Wise, Notary Public, Fourth Circuit, Republic of Hawaii." In our opinion, this certificate does not meet the requirements of the statute, not because the word "acknowledged" does not appear in it, but because neither by the use of that word nor in any word or words of equivalent import is the fact of acknowledgment stated. Even if, as has been held in some cases, in aid of a certificate reference may be had to the instrument itself or to any part of it, the defect in this instance cannot be so supplied, for there is nothing in the mortgage throwing light on the subject. It is, doubtless, "the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections." (*Carpenter v. Dexter*, 75 U. S. 513, 526, and *Kelley v. Calhoun*, 95 U. S. 710, 713,) but in this case substance is lacking. It is contended that the words "acknowledged to me that they" should be read as though they were written between the words "who" and "executed the same", but from what is written it is not a necessary inference that the officer intended to so certify or that the parties did so acknowledge. The words "are known to me to have", or the words "of my own knowledge", or the words "as I infer and verily believe from what I saw", may with equal propriety and with equal assurance that they correctly state the facts be inserted or understood. The certificate is not upon its face incomplete. The officer certifies that the parties did execute the instrument freely, but upon what he bases that assertion, whether upon the acknowledgment of the parties or upon information received from others or upon what he himself saw at the time of the execution of the instrument, he does not say. His certificate is entirely consistent with the

theory that neither of the parties acknowledged the instrument before him.

Cases have been cited in which defective certificates have been upheld but it will be found upon examination that in most of them the certificate, read by itself or with the aid of the instrument, stated in words of equivalent import or in substance the facts required by the statute to be stated, as, for example, in *Chouteau v. Allen*, 70 Mo. 290, 298, 324, in which "acknowledge" was not used, and "being duly sworn, deposes and says" were held to be words of equivalent import; or an omitted word was supplied by necessary intendment or inference, the certificate admitting of but one construction and being, even as it stood, sufficiently full and clear to convey the required meaning, as, for example, in *Talbert v. Dull*, 70 Tex. 675, 677, 678, where, the certificate being that T., "one of the above subscribing witnesses, who, being duly sworn, in due and solemn form, that he himself, with Andrew J. F. Phelan, signed as witnesses when William Richardson signed and acknowledged the foregoing instrument of writing for the purposes therein set forth", the word "says" or "said" or some word of equivalent import was held to have been omitted and the certificate was held to sufficiently show that there had been a compliance with the statutory requirement that "one of the witnesses of the number required by law shall swear to the signature of the signer." In *Bashor v. Stewart*, 54' M'd. 376 (25 Alb. L. J. 16), the certificate was, "personally appeared W. S., he being known to me to be the person who is named and described as and professing to be the attorney named in the letter, or power of attorney contained in the foregoing mortgage or instrument of *writing*, to be the act and deed of the Maryland Inebriate Asylum, the party of the first part thereto", omitting after the word "writing" the words "and acknowledged the said mortgage". The court held the omission not fatal, that the words had been omitted by mere clerical misprision and "were supplied by the context with positive certainty" and that "what might be fairly and clearly understood or implied in reading the acknowledg-

ment in connection with the deed was of the same effect as if it had been in terms expressed." It is at least doubtful if the facts satisfied the requirements of the rule purported to be followed by the court. The decision has been adversely criticised and has been said not to state the law outside of the State in which it was rendered if it goes to the extent of holding that a certificate may be sufficient when it omits to state that the grantor acknowledged the deed. See 1 Dev. Deeds, §§525, 526. The same is true, to a certain extent, of *H. L. & I. Co. v. Kerrigan*, 31 N. J. L. 13, 14, and *Jackson v. Gilchrist*, 15 Johns. 88, 108, 110, although it may be added that in these cases the fact that the deeds were respectively eighty and one hundred and seven years old had weight with the court.

On the other hand, many cases are to be found which support the view taken by us of the certificate under consideration. In *Stanton v. Button*, 2 Conn. 527, 528, the certificate was: "Personally appeared A. B. signer of the above instrument, to be his free act and deed, before me, C. D. Justice of Peace." This was held insufficient, the court saying: "A court cannot, by intendment or construction, fill a blank, or supply a word. They can only decide on the meaning and import of the words made use of. Here the words made use of can only import, that the person appearing before the justice of the peace, was the signer and sealer of the deed: they do not import that he *acknowledged* it, nor are they equivalent to such word." A case very much like that at bar is *Bryan v. Ramirez*, 8 Cal. 462, 466, in which the certificate read: "On this twenty-seventh day of July, A. D. one thousand eight hundred and fifty, personally appeared before me, a notary public in and for said county, Joseph W. Finley, known to me to be the person described in, and who executed the same freely and voluntarily, for the uses and purposes therein mentioned." The statutory requirement that the certificate "shall state the fact of acknowledgment", was held not to have been complied with. "The certificate in this case simply states that the person was known to the officer to be the person who executed the mortgage, freely and volun-

tarily, for the uses and purposes therein mentioned. The officer states his knowledge of the manner in which the instrument was executed, but does not state 'the fact of the acknowledgment.'" To the same effect are *Wolf v. Fogarty*, 6 Cal. 224, *Cabell v. Grubbs*, 48 Mo. 353, and *McDaniel v. Needham*, 61 Tex. 269. See also 1 Dev. Deeds, §§511, 517, 521, 522, 525, 526.

At the trial the notary was permitted, without objection, to testify that he had in fact taken the acknowledgment of the parties. This testimony cannot cure the defect. If the only requisite prescribed by the statute to a valid registry had been that the instrument was in fact acknowledged, the evidence might be material, but, as above stated, there is another essential and that is that the fact of acknowledgment be certified by endorsement on the instrument.

The alleged certificate being insufficient and invalid, the mortgage was not entitled to be recorded and its attempted registry must be regarded as a nullity. See *Lenahan v. Akana*, 6 Haw. 538, 541. Recorded was essential to validity and in default of such registry, the mortgage was invalid and not binding to the detriment of third parties. The statute so declares, expressly. C.L., §1853. *Ellis v. White*, 3 Haw. 205; *Lenahan v. Akana*, *supra*. Actual knowledge, if any, of this mortgage on the part of the subsequent mortgagee, the plaintiff, could not take the place of recording and did not give the first mortgage validity. It was, at best, notice of the existence of a void mortgage. *Ib.*

It may be assumed for present purposes, without so deciding, that the plaintiff's mortgage likewise was invalid, because it was not recorded, and that the defendant may take advantage of such invalidity. The plaintiff's claim of title is not based solely upon his mortgage. It is also based upon the lease from Kapu. No findings were made by the trial judge on the questions of fact involved in a determination of this latter claim, such findings, apparently, being deemed unnecessary in view of the ruling that the Schmidt mortgage was valid. It is not for this Court to

make the findings in the first instance. We cannot say that the error in the ruling just referred to was not prejudicial.

The exceptions are sustained, the judgment set aside and a new trial ordered.

Smith & Parsons for plaintiff.

Wise & Ross for defendant.

DISSENTING OPINION BY GALBRAITH, J.

The plaintiff's right to maintain this action depends upon his title to the cane, the value of which is the subject of the suit. So far as the record shows his only serious claim to title is through possession taken by virtue of an unrecorded second chattel mortgage not followed by foreclosure proceeding. If as is found by the court recording is necessary to the validity of a chattel mortgage the plaintiff could have acquired no title to the property in the manner claimed and has no standing in court and his exceptions should be overruled.

The sections of the statute prescribing a form of certificate and what the same shall contain refer primarily to deeds, mortgages and instruments affecting real estate and do not in terms refer to chattel mortgages. *Lenahan v. Akana*, 6 Haw. 538, 540. There is no form set out in the statute for the certificate of acknowledgment for chattel mortgages but Section 1839 provides that to entitle any conveyance or other instrument to record it shall be acknowledged but this section also provides for the record of instruments that have not been acknowledged. And thus refutes the claim that none but duly acknowledged and certified instruments are entitled to record.

It appears that the notary who made the certificate testified at the hearing, without objection, that he prepared the mortgage and that it was signed by the mortgagors in his presence and that they each acknowledged it to be their free and voluntary act and deed.

This testimony, under the weight of authority, was incompetent and should have been excluded on objection or stricken out on motion but no objection was made to the admission of

the evidence and no motion was made to strike it out after it had been admitted. It was before the trial court and is before this court. The testimony being uncontradicted and containing the elements of probability would under ordinary circumstances be taken as proving the fact to which it relates, namely, the "fact of acknowledgment", as an independent fact. Is there any reason why that fact may not be accepted as established in this case? This would at least avoid the paradox involved in the conclusion that the mortgage was void because not recorded although we know that it was spread upon the records. May we not proceed in the light of the fact that the mortgage was acknowledged but that there was some irregularity in certifying that fact and determine whether or not such irregularity shall be held to defeat the mortgage? From this view the inference is justifiable that the defect in the certificate of acknowledgment resulted from mistake or inadvertance.

The certificate endorsed on this mortgage, omitting the caption, is as follows:

"On this 18th day of August, A. D. 1899, personally appeared before me Chan Choon and Sing Lee, known to me to be the persons described in, and who executed the foregoing instrument who executed the same freely and voluntarily and for the uses and purposes therein expressed." The certificate is properly signed by the Notary Public and attested by his seal. The Registrar's certificate of registration is dated August 21, 1899.

The notary certifies in this certificate, (1) that the mortgagors personally appeared before him, (2) that he knew them to be the same persons described in and who executed the mortgage, (3) that these identical persons executed the mortgage freely and voluntarily for the uses and purposes therein expressed. If the notary had inserted in the proper place in the certificate the word "acknowledged" or in other words had certified the manner or how he came possessed with the information that enabled him to certify that the mortgagors "executed" the instrument the certificate would be in the usual form and not subject to criticism. Now does the omission of the word ac-

knowledge render the certificate useless and the mortgage void. The notary certifies to the ultimate fact, the execution, but omits the evidence or source of the knowledge which enabled him to certify that fact. I submit that he could only certify that fact from personal knowledge and that this personal knowledge could only have been obtained from the parties themselves, by their admission or acknowledgment. I insist that the certificate contains the essential elements and ought to be held sufficient, especially in view of the finding of the trial court, namely, that the plaintiff had actual knowledge of this mortgage.

Even where a form of certificate is prescribed by statute a substantial compliance with the form is all that is required. Dev. Deeds, §§525, 526, and cases cited in note.

"It is the policy of the law to uphold certificates when substance is found and not to suffer conveyances or the proof of them, to be defeated by technical or unsubstantial objections." *Carpenter v. Dexter*, 75 U. S. 513, 526.

"Instruments like this should be construed, if it can be reasonably done, *ut res magis valeat quam pereat*. It should be the aim of courts, in cases like this, to preserve and not to destroy. Sir Matthew Hale said they should be astute to find means to make facts effectual according to the honest intent of the parties." *Kelley v. Calhoun*, 95 U. S. 710, 713.

"The rule is certainly well settled that a defective acknowledgment cannot be taken advantage of by parties having actual knowledge of the existence of the deed or mortgage." (Citing Hilliard on Real Property, 675, Sec. 36); *Johnson v. Badger M. & M. Co.* 13 Nev. 351, 355.

Again I am not willing to assent to the construction that has been placed on Section 1853 by the court in this case, namely, that it renders an unrecorded chattel mortgage absolutely void as to every one without regard to their rights or interest in the mortgaged property. This decision, as I understand it, is directly contrary to a prior decision of this court construing that section, namely, *Wright v. Brown*, 11 Haw. 401, 403, holding that a sheriff in possession of mortgaged chattels under an execution was not a "third party" within the meaning of this stat-

ute and therefore could not resist the title of a mortgagee claiming under an unrecorded chattel mortgage.

It certainly could not have been the intention of the legislature to declare an unrecorded mortgage void between the parties or as between the parties and others without interest in the property or between a first and second mortgagee, the latter having notice of the first mortgage. The legislators are presumed to have known that the object of recording instruments is to give notice and that notice may be given aside from the record and that the notice given by one method is just as effective as the other and ought not to be held, in the absence of plain words to that effect, to have intended by this statute to make recording the exclusive method of giving notice of the existence of chattel mortgages, etc. While the statute is not happily worded I am inclined to think that it was not intended to do more than is accomplished by most statutes providing for the registration of written instruments, namely, to provide that the interest of no one in property should be prejudiced by an unrecorded instrument of which he had no actual notice.

IN THE MATTER OF THE ESTATE OF ROBERT WILLIAM HOLT, Deceased.

APPEALS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 23, 1903. DECIDED APRIL 20, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A was at the time of his death administrator with the will annexed of the estate of H. A petition for the appointment of B as "trustee" of the said estate "in the place and stead of" A, "lately deceased", and an order of court, made in reference to such petition, that B be appointed "trustee" of said estate, construed to be respect-

ively a petition and an order for the appointment of B as administrator with the will annexed of the said estate, and letters of administration issued in pursuance of such order held to be valid. The petitioners for such appointment, having appeared and submitted themselves to the jurisdiction of the court, and their successors in interest are bound by the proceedings had, even though it be assumed that there was no publication of notice to parties interested and that such publication was required by rule of court. A resignation by B "as such trustee", and the acceptance thereof held, under the circumstances of this case, to be a resignation of his office as administrator with the will annexed, and the appointment of S "as trustee to succeed" B "in the trust under the will of" H "deceased", held to constitute S administrator with the will annexed of the said estate.

OPINION OF THE COURT BY PERRY, J.

Robert William Holt died on July 6, 1862. On the 26th of the same month his will was admitted to probate and W. A. Aldrich, named in the will as such, was appointed executor. Subsequently Aldrich resigned the trust and was followed by two or more successive appointees, until in June, 1873, Alex. J. Cartwright was appointed administrator with the will annexed of the estate of the decedent. A. J. Cartwright served in that capacity until his death, June 12, 1892. On July 29, 1892, letters were issued to Bruce Cartwright as administrator with the will annexed and he took charge of the property involved and retained the same until on or about June 6, 1900, on which date Henry Smith assumed control under an appointment by a Circuit Judge as "trustee to succeed Bruce Cartwright in the trust under the will of R. W. Holt, deceased." On July 30, 1903, Henry Smith assumed control under an appointment by a Circuit Court under his appointment, and not having resigned or been removed from office, a Circuit Judge, upon petition of J. F. Colburn, a purchaser from two of the heirs, issued letters to C. A. Long as administrator *de bonis non administratis* with the will annexed, the circuit judge adopting the view advanced on behalf of the petitioner that the issuance of letters to Bruce Cartwright

as administrator and the appointment of Henry Smith as trustee were both null and void, that there was therefore a vacancy in the office of administrator and, presumably, that there are unadministered assets of the estate. It is from the order appointing Long as such administrator that the present appeals, by Bruce Cartwright, Henry Smith and certain of the beneficiaries, are taken.

The letters issued to Bruce Cartwright, duly sealed and stamped, read, after the title, as follows: "The last Will and Testament of Robert William Holt, deceased, a copy whereof is hereto annexed, having been duly admitted to Probate in this Court, and Alexander J. Cartwright, the Executor, named in the Will, having died, Bruce Cartwright, of Honolulu, is hereby appointed Administrator with the Will annexed.

"By order of the Court.

"Witness my hand and the Seal of the Supreme Court, this 29th day of July, A. D. 1892.

"(Signed) HENRY SMITH,
"Clerk Supreme Court."

One of the objections made to these letters is that they were issued by the clerk without authority from the court so to do.

The record shows that in July, 1892, a petition, signed by James R. Holt, Sr., John D. Holt, Sr., the grantors or assignors of J. F. Colburn, and by John D. Holt, Jr., was filed, reading as follows: "We, the undersigned, the *cestui que trusts* under the Will of R. W. Holt, late of Honolulu, deceased, do hereby request that Bruce Cartwright, of said Honolulu, be appointed Trustee of the estate of the said R. W. Holt in the place and stead of Alexander J. Cartwright, lately deceased, and that the bond to be filed by him as such Trustee be in the sum of Twenty Thousand Dollars (\$20000), that being the bond filed by said Alex. J. Cartwright." The clerk's minutes, signed by "Henry Smith, Clerk", read: "Tuesday, July 26, 1892, Application for appointment of a trustee of the estate of R. W. Holt in place of A. J. Cartwright, deceased. Present: J. R. Holt, one of the devisees under the will of R. W. Holt and J. D. Holt, also J. D.

Holt, Jr., son of Owen J. Holt, who request the Court to appoint Bruce Cartwright trustee in place of A. J. Cartwright, deceased. The Court appoints Bruce Cartwright, trustee of the estate of R. W. Holt under \$40,000 bond.

"Thursday, July 28th, 1892. Before Bickerton, J. This matter coming up this day upon the written request filed, after due consideration and upon the request of the parties signing the same, I hereby make the amount of the bond in the sum of \$20,000.

"July 29, 1892. Bond of \$20,000 filed and Letters issued to Bruce Cartwright, adm'r with the will annexed."

The contention on behalf of the appellees is that the petition was for the appointment of a "trustee" and that the order of the court was that a "trustee" be appointed and that the letters appointing Bruce Cartwright administrator were unauthorized, null and void. This attack upon the letters can not, we think, be sustained, whether it be regarded as collateral or as direct. The letters are regular upon their face and recite, over the signature of the clerk who was authorized by law to sign such documents, that they were issued by order of the Court. What is there in the record to show that this recital is untrue or incorrect? The petition for the appointment of Bruce Cartwright and the clerk's minutes are referred to as answering this question. The petition must be construed as a whole. It was not merely that Bruce Cartwright be appointed trustee, but that he be so appointed "in the place and stead of Alex. J. Cartwright, lately deceased." There is, too, the reference to the bond, included in the above quotation,—another indication, slight though it may be, that the new appointee was to be in the place and stead of the deceased. The word *trustee*, standing alone, in the petition was a misnomer. The intention of the applicants, sufficiently expressed, was to ask that Bruce Cartwright be appointed to fill the vacancy in the matter of the estate caused by the death of A. J. Cartwright. Whether or not A. J. Cartwright was administrator with the will annexed *and trustee* (one of his predecessors in the trust, James W. Austin, was appointed "administrator with the will annexed of Robert

W. Holt and trustee of the said estate", as to which see order filed September 30, 1870, and A. J. Cartwright himself is referred to in the clerk's minutes of September 2, 1875, as "trustee and administrator with the will annexed of said estate") we need not now decide. He certainly held an appointment as administrator with the will annexed. That is admitted by the present petitioners. The petition of 1892, then, was, at least, for the appointment of an administrator.

The minutes correctly recite the substance of the petition. They simply show that the appointment made by the court was in answer to the petition of the *cestuis que trustent* and was to fill the existing vacancy, whatever that vacancy was. There, too, the word *trustee*, standing alone, must be regarded as a misnomer. There is nothing in the minutes inconsistent with the view that after the hearing and prior to the issuance of the letters the court was satisfied that the use of the word *trustee* alone was incorrect and inadvertent and itself directed that the letters of administration issue. The presumption, in support of the regularity of the proceedings, is that the court was so satisfied and did so direct. It may be added that neither in the petition nor in the minutes nor elsewhere in the record does it appear that the administration had been prior to that time closed by A. J. Cartwright, or that any of the parties or the court so regarded it. All, apparently, deemed a continuance of the administration necessary.

The appellees further contend that the granting of letters of administration to Bruce Cartwright was void because there was no publication of notice of the hearing as required by a rule of court then in force and because, therefore, the court had no jurisdiction of the parties. That the court had jurisdiction of the subject matter is clear and undisputed. Whether any rule of court required publication of notice in such a case as this, or whether, if it did, publication was in fact made in this instance, is immaterial. The present petitioner's predecessors in interest had actual notice of all the proceedings, appeared and submitted themselves to the jurisdiction of the court,—the appointment

was made on their own petition; *then* certainly are bound and so is their grantee or assignee. If further evidence were needed as to their actual intention and understanding and that they were not in fact misled by the use of the word "trustee" in their petition and in the clerk's minutes, it is to be found in the receipts given by these two beneficiaries for their respective shares of moneys paid to them by Bruce Cartwright as "administrator with the will annexed" in the years 1893, 1894 and 1895. The title "trustee" seems to have been carelessly used by all concerned as the equivalent of, or at last as including, the title of administrator. In August, 1892, very soon after receiving letters of "administration," Bruce Cartwright filed a receipt of property from the "Executors", signed by himself as "trustee in the place and stead of A. J. Cartwright, deceased." In 1894, a year in which his accounts were rendered as administrator, he presented a petition as "trustee" for an order of partial distribution. In Schedule C, of the accounts for 1896, he is described in the body as "trustee", signed as administrator, and took receipts from the beneficiaries as "trustee". A report of the Master, made January 9, 1896, upon an account of the administrator, bears a note of approval on the margin signed by Bruce Cartwright as "trustee", while the order of the court referred to him as "administrator." In the accounts for 1897 to 1900, inclusive, he described himself as "trustee". In 1895 one of the circuit judges regarded the incumbent as administrator, as appears by an order reducing the amount of his bond. Nor was this looseness of description confined to the period of his incumbency. A. J. Cartwright's accounts for 1874, 1878, 1879 and 1888 were rendered as "administrator", while those for the period from 1879 to 1887 (one account), for 1889, 1890 and 1891 were by him as "trustee". His schedule of investments for 1876 was filed by him as "trustee". The beneficiaries' yearly receipts from 1874 to 1879 inclusive were from the "administrator", while those for 1888 were from the "trustee". And yet the appellees concede in their petition that A. J. Cartwright was administrator and held that office until his death.

In September, 1899, Bruce Cartwright filed a petition for approval of accounts and for leave to resign, which read, in part, as follows: "The undersigned, Trustee under the will annexed of R. W. Holt, late of Honolulu, deceased, herewith presents to this Honorable Court his annual account of receipts and disbursements as trustee in said estate. * * *

"The trustee respectfully represents to this Court that he is desirous of resigning and surrendering his said trusteeship, and to that end and purpose hereby petitions this Honorable Court for leave to resign his said trust, and hereby tenders his resignation as such trustee, to take effect upon the approval and settlement of the account filed herewith." Upon being notified of this petition, the present petitioner's grantors or assignors, J. R. Holt, Sr., and J. D. Holt, Sr., filed a motion in which they asked the court "that the trustee be allowed to resign and that a new trustee be appointed in his place" and another document signed by themselves with other beneficiaries, reading, "In conjunction with the petition of Bruce Cartwright, trustee under the will of said R. W. Holt, deceased, praying to be allowed to resign from said trust, we the undersigned beneficiaries of said estate recommend as a suitable person to fill the vacancy and we do hereby petition the court that Henry Smith, of Honolulu, Island of Oahu, be appointed to succeed the said Bruce Cartwright as trustee under the will of said R. W. Holt." J. R. Holt and J. D. Holt were represented by counsel at the hearing. "The Court," the clerk's minutes recite, "accepts the resignation of Mr. Bruce Cartwright and appoints Mr. Henry Smith as trustee in his place under the will of the late R. W. Holt, late of Honolulu, * * * and upon approval of the accounts, said Mr. Bruce Cartwright will be discharged as trustee of said estate and his bond cancelled." The formal order signed by the Court was "that the said trustee be and he is hereby allowed to resign, * * * that he turn over the balance of cash and securities now held by him to his successor; * * * that Henry Smith be and he is hereby appointed as trustee to succeed Bruce Cartwright in the trust under the will of R. W. Holt, deceased."

Was this resignation and its acceptance effective to terminate Bruce Cartwright's authority as administrator? If it was not, he is still administrator, there is no vacancy in the office and Long's appointment must for that reason be set aside. But we

think that the resignation was effective for that purpose. As in the case of the petition and the record of proceedings concerning Bruce Cartwright's appointment, the resignation, minutes and orders concerning the resignation of Bruce Cartwright and the appointment of Henry Smith, both of which constituted parts of one and the same transaction, must be construed as a whole. As so construed, the petition of Bruce Cartwright must, we think, be held to include a resignation of the office of administrator, its acceptance to operate to relieve him of his responsibility as such and the appointment of Henry Smith to constitute him likewise the administrator. This latter appointment Henry Smith still holds.

We have proceeded upon the assumption, without so deciding, that during the whole period covered by these various appointments there have been and that there are now unadministered assets such as to support each of the appointments of an administrator. The position of the appellees is that there are such assets. Of course, if the administration proper was closed by the executor and there have since been no unadministered assets, as is claimed by one at least of the appellants, or if there were on July 30, 1903, no such assets, Long's appointment for that additional reason is irregular and must be set aside.

It may be that Bruce Cartwright was and that Henry Smith is a trustee under the will as well as administrator, i. e., that the appointment in each instance was as administrator *and trustee*, but this point we need not decide, for the question now before is not whether there has been or is a vacancy in the office of trustee, assuming that under the will and upon all the facts of the case the necessity for such an office exists, but whether immediately prior to Long's appointment there was a vacancy in the office of administrator.

It was unnecessary to have offered in evidence the letters of administration to Bruce Cartwright. They were already a part of the record in the matter of the estate of the decedent and the circuit judge could and should have taken judicial knowledge of their existence.

In our opinion, at least if any assets of the estate of the decedent remained at the time unadministered, Bruce Cartwright was authorized under the letters issued to him on July 29, 1892, to act as administrator until the appointment of his successor and Henry Smith by virtue of his appointment on June 5, 1900, was and is now likewise authorized to act as administrator, on July 30, 1903, no vacancy existed in the office of administrator, and the appointment of C. A. Long was in any event irregular and erroneous and should be set aside. The order appointing C. A. Long administrator *de bonis non* is reversed and set aside and the cause is remanded to the circuit judge with directions to deny the petition of J. F. Colburn praying for such appointment.

C. W. Ashford for J. F. Colburn and C. A. Long.

Holmes & Stanley for Bruce Cartwright.

Hatch & Ballou for Henry Smith.

Smith & Lewis and *L. J. Warren* for certain of the beneficiaries.

BRUCE CARTWRIGHT and HENRY SMITH v. G. D.
GEAR, Second Judge of the Circuit Court of the First
Circuit, and C. A. LONG.

ORIGINAL.

SUBMITTED DECEMBER 18, 1903. DECIDED APRIL 20, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A petition for a writ of prohibition dismissed without prejudice, no necessity appearing, under circumstances stated, for the issuance of the writ at the present time.

OPINION OF THE COURT BY PERRY, J.

An order appointing respondent Long administrator *de bonis non* with the will annexed of the estate of R. W. Holt, deceased, was made by the respondent judge on July 30, 1903. After appeals from that order to this court had been noted and perfected by the present petitioners, and during the pendency of those appeals, the respondent judge, on motion of Long, issued an alternative order to Cartwright and Smith commanding them to refrain from acting as administrator or trustee respectively, or in any other representative capacity, in the matter of the estate named, and to deliver forthwith to the alleged administrator *de bonis non* all property of the estate in their possession, or to show cause to the contrary. The present petition was thereupon filed, praying that the respondents be prohibited from proceeding further in the attempt to compel an immediate delivery to Long of the possession, custody and contral of the property of the estate. A temporary writ was issued, with an order to show cause why it should not be made perpetual.

By stipulation and at the request of the parties, decision in this matter has been withheld pending the determination of the appeals from the order appointing the administrator *de bonis non*. Those appeals having been this day decided favorably to the appellants, and the order of appointment having been reversed and set aside and the cause remanded with directions to deny the petition for the appointment, we take it that the circuit judge will not attempt to enforce his order and therefore dismiss the petition now before us without prejudice.

Hatch & Ballou and *Holmes & Stanley* for petitioners.

C. W. Ashford for respondents.

E. O. HALL & SON, LIMITED, *v.* LYLE A. DICKEY.

ORIGINAL.

SUBMITTED JANUARY 25, 1904.

DECIDED APRIL 20, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Attorney's commissions and costs allowed by statute should not be included in determining whether the judgment rendered by a District Court is within the jurisdiction of the court.

The word "applicant" in the first proviso of Sec. 71 of Chapter 57, Laws of 1892, as amended by Sec. 17 of Act 32, Laws of 1903, should be read as though it were written "appellant."

The requirement from an appellant of a bond conditioned for the prompt prosecution of the appeal and for the payment of the judgment, in order to secure a stay of execution in a District Court case involving more than \$20 where the Magistrate finds that otherwise good cause is shown for the issuance of execution pending the appeal, does not unduly obstruct the right of trial by jury guaranteed by the Seventh Amendment to the Constitution and is not invalid on the ground of inequality.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

This is a petition for a writ of mandamus to compel the respondent as District Magistrate of Honolulu to issue execution, pending an appeal to the Circuit Court, in a cause wherein the respondent gave judgment for the plaintiff, the present petitioner, for the sum of \$309.40. The Magistrate, although finding that good cause was shown for the issuance of the execution pending the appeal, denied plaintiff's motion for such execution on the sole ground that Sec. 71 of Chap. 57 of the Laws of 1892, as amended by Sec. 17 of Act 32 of the Laws of 1903, which

purports to authorize such issuance, is not applicable to district magistrates in cases where the amount involved is over \$20.

In his answer, the respondent sets up the additional ground that the judgment, being for an amount exceeding \$300 was beyond his jurisdiction to render and is therefore voidable. This point was practically disposed of in *Lewers & Cooke v. Redhouse*, 14 Haw. 290, 293, in which it was said: "Attorney's commissions and costs allowed by statute should not, we presume, be included in determining the jurisdictional amount. They are not a part of the claim or of the amount sued for. They are incidental to the action itself. They are not due and could not be claimed until the termination of the action." In the case under consideration the judgment was for \$275.91 damages, \$15.26 interest, \$14.78 attorney's commissions and \$3.45 costs of court. Excluding attorney's commissions and costs, the amount of the judgment was within the jurisdictional limit.

Section 71 of Chap. 57 of Laws of 1892 (C.L., Sec. 1435), as amended by Sec. 17 of the Laws of 1903, reads as follows: "An appeal duly taken and perfected in any case from a judgment, order or decree of a Circuit Judge or District Magistrate shall operate as an arrest of judgment and stay of execution; Provided, however, that the Judge or Magistrate may, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of such judgment, order or decree, pending such appeal, unless the applicant shall within such time as shall be allowed by the Judge or Magistrate deposit a bond in such amount and with such sureties as shall be approved by the Judge or Magistrate (the amount to be not less than double the amount of the judgment, order or decree, if it is money judgment, order or decree) conditioned for the prosecution of the appeal without delay and for the payment or other performance, as the case may be, of the judgment, order or decree or part thereof that may be rendered or affirmed in the appellate court; and, provided further, that no political corporation or officer or executor, administrator, guardian, trustee or receiver, acting in his official capacity, need deposit such bond

in order to prevent the enforcement of such judgment, order or decree, pending the appeal, and provided further, that in case of an appealable order of a Circuit Judge for counsel fees, suit money, temporary alimony, or other provisional order of a like nature made before final judgment in the cause, an appeal shall not operate as an arrest of judgment or stay of execution, if the appellee shall deposit a bond in such sum and with such sureties as the Judge shall approve, conditioned for the indemnification of the appellant for all damages that he may sustain by reason of the payment or execution of such order, in case the appeal shall be sustained."

The main defense is that the first proviso of this section does not apply to cases tried by district magistrates in which the amount involved exceeds \$20,—that, in other words, if it does apply to such cases it is invalid because it unduly obstructs and practically denies the right of trial by jury secured by the Seventh Amendment to the Constitution. A preliminary question also arises and that is as to the correct construction of the word "applicant" in the first proviso.

We have no hesitation in holding that the word "applicant" should be read as though it were written "appellant"; and it is immaterial in this respect whether the word was purposely used as written to denote the party who is appealing or was inadvertently, through an error of the copyist, so written in place of the word "appellant", although we think that the latter is the correct explanation. In any event, a reading of the section as a whole shows clearly that the appellant is the party referred to. It can be no other. The provision is that execution may issue "unless the applicant shall * * * deposit a bond * * * conditioned for the prosecution of the appeal without delay, and for the payment or other performance * * * of the judgment, order or decree or part thereof that may be rendered or affirmed in the appellate court." Who is it that is interested in preventing, temporarily or otherwise, the enforcement of the judgment? Only the party against whom it is rendered, the appellant. The bond must be conditioned for the prosecution of the appeal.

Who, other than the appellant, can prosecute the appeal? -No one. The bond must also be conditioned for the payment of the judgment or part thereof that may be rendered or affirmed by the appellate court, that is, for the payment of the judgment or part thereof originally rendered in the district court. No one but the party against whom it is rendered, the appellant, can be expected or asked to assure the payment of such judgment. Moreover, the legislature in the second proviso named certain exceptions to the rule stated in the first, declaring that "no political corporation or officer or executor, administrator, guardian, trustee or receiver, acting in his official capacity, need deposit such bond," that is, the bond required by the first proviso, "in order to prevent the enforcement of such judgment * * * pending the appeal", thus disclosing beyond any doubt that the object of the filing of the bond is to prevent the enforcement of the judgment. As already stated, the appellant only can have any desire to prevent such enforcement. Certainly, by the "applicant" the legislature did not mean the party prevailing and could not have meant a stranger to the record. It meant either the applicant for an appeal,—an unusual term of description, no doubt,—or, as we think, it meant the "appellant" and intended to use that term but through inadvertence permitted the word "applicant" to find its way into the enrolled copy of the bill. The intention of the legislature in the use of the word being made clear by the remaining language of the section, that intention is sufficiently expressed and must be given effect.

As to the validity of the first proviso as applied to district court cases where the value in controversy exceeds \$20, the question now before us differs materially from that considered in *Wong Chow v. Dickey*, 14 Haw. 524. The statute in force at the date of that decision (C.L., §1435) provided that "an appeal duly taken and perfected in any cause provided for in this Act shall immediately thereafter operate as an arrest of judgment and stay of execution, provided that execution may issue pending such appeal upon good and sufficient cause being shown therefor." We held that to permit an enforcement of a judgment pend-

ing an appeal and before an opportunity had been had for a trial by jury was in substance a denial of the right to such trial guaranteed by the Seventh Amendment. Four months later the legislature amended Sec. 1435 so that it now reads as above quoted. As amended, the section does not deprive the appellants referred to in the first proviso of the right of trial by jury in any cause. It is true that in certain cases appealed from district courts a condition to the obtaining of such trial is imposed, in that an appellant against whom good cause for the immediate issuance of execution is shown is required, in order to secure a stay of execution until after a jury trial has been had, to deposit a bond conditioned for the prosecution of the appeal without delay and for payment of the judgment or part thereof that may be rendered or affirmed on appeal. The right to a trial by jury, however, remains and is available to the appellant. The condition named does not constitute a denial of the right and does not unduly obstruct it. This was expressly held in *Capital Traction Co. v. Hof*, 174 U. S. 1, 23, 25, 43, 44, 45, in which the court, after an exhaustive consideration of the subject, said, *inter alia*: "Upon the whole matter, our conclusion is * * * that the right of trial by jury in the appellate court is not unduly obstructed by the provisions enlarging the civil jurisdiction of justices of the peace to three hundred dollars, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court; that the legislation of Congress upon the subject" (including the provisions just referred to by that court) "is in all respects consistent with the Constitution of the United States." The point needs no further discussion at our hands. The mere fact that the bond required by our statute must be in *double* the amount of the judgment appealed from, as was perhaps not the case in *Capital Traction Co. v. Hof*, *supra*, does not distinguish the case at bar from that. The condition is still a reasonable one and does not unduly obstruct the right. Cases in which the statutes involved contained the same requirement were among those referred to with approval by the court in the *Capital Traction Co.* case.

It is said, however, that the amended section is objectionable, further, in that the condition named in the first proviso is imposed, not upon all appellants alike, but only upon some and not upon others, at the mere will of the magistrate, and that in this respect, also, the statute differs from that under consideration in *Capital Traction Co. v. Hof*. The two statutes do so differ, that in the case just cited affecting all the appellants; and yet the authority of that case remains unimpaired upon the point for which it was cited. The objection now under consideration, which, it is to be noted, would apply equally to appeals from circuit judges, has no relation to any possible contravention of the Seventh Amendment. It must be based and stand, if at all, only upon the provision of the Fourteenth Amendment that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws", or upon the fundamental principle of equality which underlies a republican form of government.

The statute, it must be observed, does not give the magistrates the arbitrary power of determining what appellants may have an appeal or a jury trial without depositing the bond and what ones only after such deposit. It merely vests in them the power to determine in their discretion, a judicial discretion, in what cases the bond shall be required, and goes further and furnishes the standard by which they are to be guided in arriving at that determination, by providing that the bond shall be required only in those cases in which good cause is shown for the immediate issuance of execution. If this discretion is abused there is a remedy by appeal. There is no inequality in the provision. All are treated alike who are situated under like circumstances. See 6 Am. & Eng. Encycl. Law, 2nd Ed., 967; *Hayes v. Missouri*, 120 U. S. 68, 71, 72; *Mo. R'y. Co. v. Mackey*, 127 U. S. 205, 209. If the objection was good in this instance, it would likewise invalidate other conditions now imposed in appeals from district courts, e.g.: where the amount involved is less than \$50, a jury trial can be had only after a trial in the district court and the furnishing of a \$100 bond for

costs on appeal; where the amount is between \$50 and \$300, a jury trial can be had with or without a prior trial in the district court and with or without such appeal bond at the discretion of the party suing, by permitting the latter, at his option, to sue in the district or circuit court; and where the amount is over \$300 a jury trial may be had in all cases without any prior trial and without the giving of any appeal bond. Could it be successfully contended that any real inequality results from these differing provisions? We think not. Inequality, indeed, there might be if dishonest parties appealing solely for purposes of delay or of harrassing the appellee, should be permitted to prevent the enforcement of a just judgment without being required to give some such security as is here provided for. As was said by the Supreme Court of Pennsylvania in *Biddle v. Commonwealth*, 13 S. & R. 405. 410, 411, in answering the contention that the right of appeal and of trial by jury was clogged with the statutory condition of the appellant's making oath "that he verily believed that injustice had been done him, and that the appeal was not made for the purpose of delay" (this condition is very similar, if not the same in substance as, that prescribed by our statute): "This is no more than a wholesome regulation. The object of courts is, to administer justice, and no man has a right to complain, because he is refused an appeal intended for the purpose of delay, or in a case in which he does not think that he has suffered injustice. It might as well be said that the trial by jury was attacked by a law which should forbid a defendant to put in a dilatory plea or to plead *non est factum*, in an action of debt on a bond, without swearing that he believed the matter of the plea to be true. Laws such as these promote justice, and leave the substance of the trial by jury unimpaired, and that is all that is required by these expressions in the Constitution, 'that trial by jury shall be as heretofore'."

This proceeding has been here treated as one against the respondent as District Magistrate because that is what it is in substance though not, strictly, in form. In the petition the re-

spondent is named simply as "Lyle A. Dickey", but the averments show clearly that the intention was to ask for the relief from him as district magistrate and not in his individual or any other capacity. The defect would seem to have been waived by the respondent in answering to the merits and in proceeding to a hearing without raising the point. In any event, the petition is capable of amendment in this respect.

Upon an amendment as to the name of the respondent being asked for and made, a peremptory writ should be issued directing the respondent to issue execution at once unless the judgment debtor and appellant in the original action shall deposit the bond required by law.

J. A. Matthewman for petitioner.

W. C. Achi for respondent.

DISSENTING OPINION BY GALBRAITH, J.

There are several reasons why the peremptory writ of mandamus should not issue and these proceedings should be dismissed, among these are:

1. That the defendant is sued as Lyle A. Dickey, not as Lyle A. Dickey, First District Magistrate of Honolulu, and the writ is directed to him in the same form. The court might compel by mandamus the defendant as an official to perform some duty required of him by law and which he refuses to perform, but as an individual we have no power to control his conduct by this extraordinary writ. This proposition is elementary.

2. The section of the statute relied on by the plaintiff reads in part as follows: "An appeal duly taken and perfected in any case from a judgment, order or decree of a Circuit Judge or District Magistrate shall operate as an arrest of judgment and stay of execution: Provided, however, that the Judge or Magistrate may, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of such judgment, order or decrees, pending such appeal, unless the applicant shall within such time as shall be allowed

by the Judge or Magistrate deposit a bond in such amount and with such sureties as shall be approved by the Judge or Magistrate (the amount to be not less than double the amount of the judgment, order or decree, if it is money judgment, order or decree) conditioned for the prosecution of the appeal without delay and for the payment or other performance, as the case may be, of the judgment, order or decree or part thereof that may be rendered or affirmed in the appellate court"; * * * * Section 17, Act 32, Session Laws of 1903.

The meaning of this statute is not clear. The plaintiff assumes that it means that notwithstanding an appeal has been duly taken and perfected from the judgment the District Magistrate may, "upon good cause shown" order execution for the enforcement of the judgment unless the judgment defendant shall file a bond, etc. The statute does not read that way. It reads "unless the applicant shall" * * * "deposit a bond". The "applicant" for what? The execution? No. It could not mean that the plaintiff should file a bond to prosecute the appeal. That would be absurd. He has no control over the appeal and the judgment is payable to him and not by him. Nor can the word "applicant" in this connection by any fair or reasonable interpretation refer to the judgment defendant. He has perfected his appeal and transferred the case to the circuit court where he is entitled to a trial *de novo* and a jury trial if he desires it. He is not an applicant for anything further from the district magistrate or his court.

When "the intent of the legislature" is spoken of I understand that we refer to the meaning of the words used in the statute, and not to the unexpressed thought that may have been in the mind of the members or the framer of the statute. The word "applicant" is not a technical word or a term of art but is a simple word in general use. What authority have I to substitute for it another word which I may think was in the mind of the framer of the statute and which to my mind better effectuates the purpose of the statute than the plain word used? To do this is coming very near an act of legislation. Again I have

no means of knowing that some members of the legislature did not favor this act for the reason that the word "applicant" was used and might not have favored if the word "appellant" had been substituted for it.

This statute attempts to place restrictions on the right to appeal and the pursuance of the method provided by law to obtain the constitutional right of trial by jury and under all canons of constructions should be strictly construed; under such construction the return of the defendant was sufficient to justify his refusal to issue execution.

If we assume for the purposes of this case, something that we have no right to assume, namely, that through inadvertence or mistake the word "applicant" in this section of the law was substituted for the word appellant then the intent of the law-maker, as contended for by the plaintiff, would be clear, namely, that it was the purpose to empower the district magistrate to issue execution in certain cases unless the appellant should enter into bond in double the amount of the judgment conditioned to prosecute the appeal without delay and to pay the judgment rendered in the appellate court. In other words the district magistrate is given the power, in his discretion, to deny a litigant the right to a jury trial in a case involving twenty dollars or more unless he shall execute a bond as the magistrate directs. The giving a bond is not made a condition to the right to appeal in all cases but only in such as the magistrate shall order.

Such a statute is of an entirely different character from those approved by the United States Supreme Court (*Capital Traction Co. v. Hof*, 174 U. S., 1) wherein it was held that "the right to trial by jury is preserved" although the right to appeal from the judgment of a Justice of the Peace, where no jury trial could be had, to the appellate court where such trial was available, were allowed only on paying costs and giving a bond in double the amount of the judgment conditioned for the diligent prosecution of the appeal and the payment of the judgment that might be rendered on appeal. In the class of statutes last mentioned the condition is prescribed by law and is applicable to all

litigants alike. There is no discretion placed with any Justice of the Peace to require a bond as a condition of appeal in some case and to waive it in others.

The law of this Territory permits an appeal to be taken on paying costs accrued and giving bond for payment of costs on appeal. Ordinarily an appeal duly perfected operates as a supersedeas and stay of execution. The statute under consideration was evidently intended to restrict the right of appeal and to make it conditional in certain cases. The practical operations of this statute, it is plain to be seen, would permit some litigants to appeal without giving the bond therein prescribed and to deny the benefit of an appeal to others unless the bond were given. In other words under the operation of this statute the law of appeals to some litigants would be one thing and to others something totally different. A municipal law (and the statute under consideration is a municipal law, if any thing,) is defined as "a rule of civil conduct." Why a rule? "It is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal". 1 Blackstone, p. 44. No "applicant" or appellant can possibly know whether or not his appeal to the circuit court is to be conditional on his filing a bond to pay the judgment on appeal until the inner thought of the district magistrate has been revealed. The statute is wanting in the essential elements of a law, namely, it is neither "uniform" nor "universal" in its operation. A law must be the same to all litigants, i. e., it must be a rule.

Aside from the foregoing objections this statute if it means what the plaintiff contends it means, placed restrictions and limitations around the constitutional right of trial by jury or method of obtaining it that is clearly beyond the power of the Territorial Legislature to do. The mandate alike to the legislature and the court is that "the right of trial by jury must be preserved." Placing the power within the discretion of a district magistrate to deny the right to appeal to the circuit court where the right to a jury trial may be had or to make it conditional on

giving a bond within the discretion of the magistrate is certainly restricting the right in such manner that it cannot properly be said "to be preserved." In other words it places restrictions on the right to appeal in some cases that is not required in others.

What this court said in regard to this statute prior to the adoption of the amendment now under consideration is equally pertinent in this connection, namely: "There is strong ground for the contention that the issuance of execution on the judgment of the District Court where a jury trial is impossible, pending an appeal to the Circuit Court where such trial is available, is practically a denial of the right to a jury trial. * * *

"To be entirely effective this right should be available before the defendant's property is seized and sold under execution. To seize and sell his property and then permit him to have a jury trial to determine whether or not it should have been seized and sold, is, to put it mildly, placing restrictions about this constitutional guarantee that ought not to be upheld." *Wong Chow v. Dickey*, 14 Haw. 524, 526, 527.

The statute is wrong in theory. It gives an obvious advantage to the wealthy over the poor litigant. If a bond to pay the judgment on appeal is required as a condition to an appeal it ought to be required in all cases and should not be left to the discretion of a district magistrate or any other officer to say who shall give bond and who shall not before appealing to the Circuit Court.

The peremptory writ should be denied and the proceedings dismissed.

TERRITORY OF HAWAII v. NG KOW.**EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.****SUBMITTED JULY 16, 1903.****DECIDED APRIL 22, 1904.****FREAR, C.J., GALBRAITH AND PERRY, JJ.**

On exceptions to the overruling of a challenge to the array of jurors and motion to quash the venire, the presumption is that the officers complied with the law except in so far as the contrary appears; and grounds not made the basis of the challenge and motion in the lower court will not be considered.

Where a venire for named persons selected under the statute was issued and also an open venire, with an oral order to summon the same persons, it is immaterial whether the latter was invalid or whether an open venire could issue at all under our statutes, if the venire under the statute was valid.

To refuse to allow the clerk of the court to testify in support of the challenge and motion, if error, is harmless when the grounds of the challenge and motion are insufficient in law.

From the establishment of Territorial government until the jury law of 1903 took effect, it was proper to obtain trial juries in the mode prescribed by the Hawaiian statutes as amended by the Organic Act. The Organic Act did not repeal so much of such statutes as to leave the rest inoperative.

OPINION OF THE COURT BY FREAR, C.J.

This case comes up on exceptions to the overruling of a challenge to the array of jurors and motion to quash the venires under which they were summoned, and to a refusal to allow the clerk of the court to testify in support of the challenge and motion. The case was one of assault and battery appealed to the Circuit Court from the District Court of South Hilo. The chal-

lenge and motion were made when the jurors were called to the jury box but before they were sworn.

Under the jury laws (C.L., Chap. 90, and Laws of 1892, Chap. 57, Sec. 82) in force at the date of the annexation of these islands to the United States, the Judge and the Clerk of the Court twice a year prepared lists of fifty native Hawaiians and fifty persons of foreign parentage in certain circuits, and fifty native Hawaiians in other circuits, and in the latter circuits, if a jury composed wholly or in part of foreigners was needed, a sufficient number of foreigners were summoned for the purpose. The Clerk, at least twenty days before a term, in the presence of a judge, drew from a box containing the names of the persons so selected, twenty-four names, except in the first circuit, in which thirty-six names were drawn. The persons whose names were thus drawn were summoned by the sheriff, and the twelve jurors required in any particular case were drawn from these, subject to challenges. Juries were obtained in this way after annexation and until the Territorial government was established. The Organic Act, which established that government, made radical changes in the jury system. It not only introduced the grand jury and required unanimity in verdicts of trial juries, but abolished race and mixed juries. Sec. 83. The changes were so sweeping that it was a serious question whether enough of the old laws remained to be effective or workable.

Circuit Judges seem to have differed as to whether the old jury law was operative after the Organic Act took effect. Some obtained juries by proceeding under that law as nearly as they could; others by issuing open venires to the sheriffs. The Judge in the circuit now in question, in his effort to avoid any question of illegality, endeavored to obtain juries in both ways—by proceeding under the statute in the first instance and then issuing an open venire to the sheriff, with an oral direction, as the defendant contends, to summon the same persons.

The defendant contends that error was committed in this instance in each course pursued, whichever was the correct course, and that the correct course was by open venire as at common law.

We find considerable difficulty in ascertaining the exact facts from the challenge and motion and the affidavits filed in support of them. These documents not only are each somewhat uncertain in itself in some respects but they are to some extent inconsistent with each other. We shall proceed on the presumption, which is elsewhere held to obtain in cases of this kind, that the officers performed their duties and that the juries were selected in accordance with law, in so far as the contrary is not clearly shown, and on the rule that the grounds of challenge should be shown specifically and that grounds not set forth in the challenge and motion should not be considered.

It appears that two sets of venires were issued for the term, each consisting of one venire for twenty-four named jurors drawn from the list of fifty under the statute and one open venire, with, as contended, an oral direction to summon the same twenty-four persons.

The ground relied on for quashing the venires that were open in form is that they were not open in reality because, as contended, the sheriff did not choose or select the jurors so summoned or have an opportunity to do so but was obliged by the oral order of the Judge to summon the persons drawn by the Judge and the clerk. Inasmuch as, in our opinion, it was proper to proceed under the statute, it is unnecessary to say whether the open venires in question, if valid in other respects, were invalid on the ground relied on, or to say whether, if the statute were inoperative, juries could be obtained by open venire as at common law, although the view was expressed in one of the opinions in *Hawaii v. Mankichi*, 190 U. S. 197, 217, that they could not be so obtained, by reason of the provision in C.L., Sec. 1109, "that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." If the jurors were properly selected in this case under the statute, it would be immaterial that the same persons were summoned under an open venire also, whether valid or invalid.

Two grounds are relied on to show that the venires issued under the statute were illegal, first, that they named the persons

to be summoned, thus leaving no choice or selection to the sheriff and, secondly, that the persons so named were not selected from the body of the circuit. The first of these grounds is based on the theory that the statute was inoperative and that the proper course was to summon the jurors by open venire. If, as we hold, the statute was operative, this ground falls, for the statute required the twenty-four named persons to be summoned. C.L., Sec. 1330. The second ground is not relied on for quashing the first venire issued under the statute. It is relied on solely for quashing one of the other venires—which we will assume to be the second one issued under the statute, the one intended by counsel, although in the motion it is described as the venire of January 14, 1903, which we understand is the second open venire. We will also assume that the jury in this case was drawn from those summoned under the second statute venire, although neither the bill of exceptions nor the motion to quash indicates this. Under this ground it is contended that the jurors were mostly from the town of Hilo and but little, if at all, from the country districts of the circuit. There was nothing in the statutes at that time or in the general law (see 12 Enc. Pl. & Pr. 289) to prevent jurors from being drawn chiefly from a portion of a circuit.

Whether any of the other grounds for quashing the venires relied on in argument in this court would avail, if they had been presented to the Court below at a seasonable time and made the subject of exceptions, we need not say. We can consider only the grounds presented by the challenge and motion in the circuit court.

The refusal to permit the clerk to testify in support of the challenge and motion, if error, was harmless in the view that we take of the case. The affidavits set forth the methods by which the jurors were drawn as stated by the Judge in open court and by the clerk privately. The clerk was not called as a witness to enable the defendants to ascertain how the jurors were drawn, on the theory that the defendant was entitled to know and could not ascertain except by putting the clerk on

the stand. He was called solely "to give sworn testimony in support of the said challenge and motion." For the purposes of these exceptions we assume that the allegations contained in the motions are true and we cannot hold that the clerk should have been allowed to testify on the theory that he might possibly testify for other purposes than those for which he was called. The grounds set forth in the challenge and motion, if true in fact, were, as we hold, insufficient in law.

As already stated, we hold that it was proper to pursue the statutory method. That was clearly the intention of Congress as shown by the Organic Act. That Act (in Sec. 7) specifically repealed certain provisions of the jury laws (C.L., Secs. 1329, 1331, 1332,) relating to race and mixed juries and certain other provisions and (in Sec. 83) repealed in general terms the same and some other provisions, and amended by implication still other provisions, thus impliedly showing an intention to leave the rest in force as amended. It not only did that but it expressly provided (in Sec. 83) "that the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature." It went further and provided that "until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries," thus showing about as clearly as possible that "the manner provided by the Hawaiian statutes for drawing petty juries" was, "except as amended by this Act" intended to be "continued in force" until modified "by Congress, or the legislature." The only question is whether Congress succeeded in effectuating that intention, that is, whether, in spite of that clearly expressed intention, Congress unwittingly repealed so much or such essential parts of the jury laws as to leave the rest as amended incapable of execution. Counsel have not attempted to point out any difficulties in the execution of those laws as so amended. We do not feel called upon to go through them at length and show negatively that there was no insur-

mountable obstacle in their practical operation. As we read them with their implied amendments made by the Organic Act, they appear to have been workable.

The exceptions are overruled and the case remanded to the Circuit Court for any further proceedings that may be proper and consistent with this opinion.

L. Andrews, Attorney General, for the Territory.

Kinney, McClanahan & Bigelow, Smith & Parsons, Thayer & Hemenway for the defendant.

TERRITORY OF HAWAII *v.* E. S. CUNHA.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED MARCH 5, 1904.

DECIDED APRIL 29, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A section of a statute may be invalid in part and valid as to the remainder.

A statute which forbids any keeper or proprietor of any place where intoxicating or spirituous liquors are sold to permit any minor to visit or remain in the room where said liquors are sold or kept for sale is not invalid as being in excess of the police power or contrary to the 14th Amendment.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal on points of law from a judgment of the District Magistrate of Honolulu finding the defendant guilty of violating Section 2 of Act 4 of the Laws of 1901 and sentencing him to pay a fine of \$25 and costs. Two points are raised: (1) that the law is unconstitutional, (2) that the evidence was insufficient.

The law, omitting the enacting clause and Section 4, which provides when it shall take effect, reads as follows:

"An Act to Prevent the Employment of Minors in Places Where Intoxicating Liquors are Sold, and to Prevent Minors from Visiting such Places.

"Section 1. It shall be unlawful for any keeper or proprietor of any place where intoxicating or spirituous liquors are sold or dispensed, to employ in or about the room where such liquors are sold or dispensed, any minor.

"Section 2. It shall be unlawful for any keeper or proprietor of any place where intoxicating or spirituous liquors are sold or dispensed, to permit any minor to visit or remain in the room where said liquors are sold, kept for sale or dispensed.

"Section 3. Any person who shall violate or fail to observe any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be find not less than twenty-five dollars nor more than one hundred dollars, and on his second offense the license of said person shall be forfeited and revoked."

We need not inquire to what lengths the legislature may go in the exercise of the police power for the preservation of the public peace, safety, health and morals, especially with reference to the subject of intoxicating liquors, or how far the state may go as *parens patriae* or otherwise for the protection of minors, or to what extent, if any, the 14th amendment, on which special reliance is placed by the defendant, might limit the legislative power in these respects. See in general *Crowley v. Christensen*, 137 U. S. 86; *Vance v. Vandercook*, 170 U. S. 438; *Powell v. Pennsylvania*, 127 U. S. 678; *Mugler v. Kansas*, 123 U. S. 623; *People v. Ewer*, 141 N. Y. 129; *Goldsticker v. Ford*, 62 Tex. 385.

The contention is that this section of the statute goes too far in that, although intended, as argued, to prohibit the employment or loitering of minors in saloons, it is not confined to employment or loitering but extends to mere remaining, perhaps on lawful business, as, for instance, to collect an account, and is not confined to places where liquor is sold to be drank on the premises, but extends to any place where it is sold, for instance,

to wholesale houses, hotels, etc., and even to any place where it may be dispensed, as, for instance, by way of gift at private residences. The prohibition, it will be noticed, extends only to the room in which the liquors are sold, kept for sale or dispensed and not to other rooms in the same building. The room in question was one in which liquors were sold at retail to be drank there.

As to private residences, it is unnecessary to say whether the act should be construed as applicable to them, or whether, if applicable to them, it would prevent the furnishing of liquor to one's family or to those who as employees or guests might be considered as belonging to the family in a broad sense, or whether, in either case, such a provision would be beyond the legitimate exercise of the police power. See *Republic v. Akau*, 11 Haw. 363, and cases there cited. The words "or dispensed", on which alone this contention is based, may be eliminated without affecting the remainder of the statute, especially as those words are not included in the title of the act. The "place" in question was one "where intoxicating or spirituous liquors are sold" and not merely "dispensed".

As to "remaining" as distinguished from "loitering" and "any place" where liquors are sold, whether to be drank on the premises or not, the argument seems to be based largely on the assumption that this statute differs from statutes elsewhere in these respects, and that the fact that other statutes do not go as far as ours shows that it is not necessary that it should go so far and that it is deemed to be beyond the legislative power to go so far. But the authorities seem to show that statutes of this character have been enacted and held or assumed to be valid repeatedly in other jurisdictions. In some cases the provision is found in the statute itself, in others it is required by the statute to be in the bond. In *Goldsticker v. Ford*, *supra*, the words were "enter upon or remain", though on premises where liquor was sold at retail only. It seems that in that state (Texas) the provision at first applied to places where liquor was sold whether to be drank on the premises or not, but that subsequently the law was changed to apply only to premises where

the liquor sold was to be drank thereon. *State v. Meyer*, 23 S. W. (Tex.) 427; *Drake v. State*, 23 S. W. (Tex.) 620. In *State v. Kinkead*, 57 Conn. 173, the word "loiter" was used, but it was on premises where liquor was kept for sale, without stating whether at wholesale or retail. In *People v. Hughes*, 86 Mich. 180, the words were "visit or remain" in any room where liquor was "sold or kept for sale". In *Bergman v. Cleveland*, 39 Oh. St. 651, the word "employ" was used with reference to females in any 'saloon, restaurant, or room or place' where liquor was "sold or kept for sale". In *State v. Considine*, 16 Wash. 358, and *In re Considine*, 83 Fed. 157, the prohibition was against the employment of females in any capacity in theaters, etc., where liquor was sold as a beverage, but did not extend to the attendance or remaining of females who were not employed, and that discrimination was relied on as one of the grounds on which it was contended that the statute was invalid.

The only case cited which held the law invalid is that of *Gastineau v. Commonwealth*, 49 L. R. A. 111, decided by the Kentucky court of appeals. A city ordinance was held invalid which forbade any saloon keeper to allow any woman to come in or out of his building where liquor was sold or offered for sale and forbade any woman to so come in or go out or to frequent, loaf or stand around said building within fifty feet thereof. The opinion is brief and was apparently based on the view that the ordinance was an unreasonable interference with individual liberty, but it was intimated that it might perhaps have been valid if it had been confined to disreputable women. What view the court would have taken if the ordinance had related to minors it is impossible to say. The ordinance differed materially from our statute and from the statutes referred to in the cases above cited. It is unnecessary to say whether the decision is distinguishable from or contrary to other decisions on questions of this general nature.

In our opinion the legislature did not exceed its powers in enacting this statute. If the statute is thought to go to unrec-

essary lengths, the Legislature is the body to which application should be made for relief.

The second point is that the evidence was insufficient in that it fails to show knowledge or intent or responsibility on the part of the defendant as to the minor's presence in the saloon.

We may assume for present purposes that such a showing must be made affirmatively and that it is not sufficient to show merely that the minor remained in the saloon and leave it to the defendant to show that he was ignorant of it and had nothing to do with it. See *People v. Hughes, supra*, and *Campbellsville v. Odewalt*, 60 L. R. A. (Ky.) 723. The evidence was sufficient to support a finding that the defendant employed the minor to serve in the saloon as well as elsewhere in connection with the business. For instance, the minor himself testified as shown by the District Court minutes: "Am 18 years old. Know deft. Am employed by him. On June 22, 1903, I was down in the cellar under Union Saloon, Cunha's saloon back of Hawn. News Co. on Merchant St. here in Honolulu, opening cases of gin. On 22nd of June, I was in saloon, I was working. I know there were spirituous liquors sold while I was there. X Examined: I was down in cellar at 8:30 a. m. I know Justice. I had instructions not to serve him with liquor. Am employed there from 5:30 a. m. to 10 a. m. On June 22, I was in bar room, behind the bar, before 12 o'clock. I was 18 years old on May 12 last. My parents are alive. They permitted me to work in deft.'s saloon, they allowed me to work there, they know I work there."

The judgment of the District Court is affirmed.

L. Andrews, Attorney General, and *N. W. Aluli* for the Territory.

E. M. Watson for the defendant.

TONG KAI *alias* TAING KAI v. TERRITORY OF
HAWAII.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 22, 1904.

DECIDED APRIL 30, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In the absence of any showing to the contrary the presumption is that the grand jurors who found an indictment were good and lawful men and that not less than twelve concurred in the finding.

A person accused of an offense has no right to appear before or to have witnesses heard in his behalf by the grand jury.

A deputy of the attorney general for the Territory is an executive officer and may *decide* and act upon matters that come or are brought before him, within the meaning of Section 255 of the Penal Laws.

An attempt by a promise of a gift of money to influence a deputy of the attorney general for the Territory, even before the intended commission of an offense, in his decision and action concerning the criminal prosecution of the offender, is punishable under §255 of the Penal Laws.

A conviction based upon the uncorroborated testimony of an accomplice is legal.

A person who has sworn falsely in a case but has not been convicted of perjury, is not thereby rendered incompetent as a witness in a subsequent case.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

The plaintiff in error was tried, convicted and sentenced for violating Section 255 of the Penal Laws. Eleven errors are assigned. The first and tenth assignments are abandoned. The

second, third and fourth are that it does not appear that the grand jurors who indicted the plaintiff in error were good and lawful men of the First Circuit, that with the exception of the foreman it does not appear that not less than twelve grand jurors found a true bill against the plaintiff and that the grand jury was instructed, in effect, not to permit accused persons or their attorneys or witnesses to appear before or be heard by it. None of these objections were raised until after verdict and must be deemed to have been waived. *Oriemon v. Territory*, 13 Haw. 413, 416. But even if regarded as not waived they cannot be sustained. The verdict on its face purports to have been presented by "the grand jurors of the Territory of Hawaii", bears the endorsement "a true bill found this 14th day of May, A. D. 1903" over the signature of "A. W. Pearson, Foreman of the Grand Jury" and was duly filed. In the absence of any showing to the contrary, the presumption is that the grand jurors were good and lawful men and that not less than twelve concurred in finding the indictment. The instruction given was correct. The accused had no right to appear or to have witnesses heard in his behalf by the grand jury.

5. That there was no evidence at the trial that plaintiff in error corruptly promised an executive officer of the Territory of Hawaii a sum of money to influence his acts. The indictment charged, in substance, that the plaintiff did corruptly promise the sum of fifteen hundred dollars as a gift and gratuity to one E. C. Peters, an executive officer of the Territory, with intent to influence him in his acts as such officer in proceedings that might by law come or be brought before him in his official capacity, to-wit, criminal prosecutions by the Territory against the plaintiff and others for the offense of maintaining and conducting at Honolulu a lottery known as pakapio. The evidence was such as to justify a finding that the plaintiff offered to Mr. Peters, as Deputy Attorney General, the sum of \$1500 per week as a gift or gratuity for the purpose of influencing him and the other officials of the attorney general's department to desist from arresting or prosecuting the plaintiff and certain associates of

his in the event of their opening and conducting a certain lottery which they were desirous of maintaining in this city contrary to the provisions of our penal statutes. It may be that the evidence does not show how Mr. Peters was to secure the co-operation of his superior and assistants, but there was sufficient to show that the money was to be paid to him, without any condition or obligation on his part to pay the whole or any part of it to others, and that he was to see to it that the desired immunity from arrest and punishment followed.

The evidence shows that Mr. Peters was at the time deputy attorney general of the Territory. It is contended that no such office exists under our law or that, if it does, such deputy does not possess the same powers as are vested in the attorney general by law and that, therefore, Mr. Peters could not, in any official manner, be concerned in criminal prosecutions. Whether or not a deputy attorney general can be appointed with all the powers of the attorney general need not be determined. It is sufficient for the purposes of this case if authority exists, as we think it does, for the appointment of such a deputy with such of the powers of the Attorney General as relate to the prosecution of offenders throughout the Territory. C.L., §1013, provides that "the Attorney General shall appear for the Government personally or by deputy in all the courts of record of this Territory, in all cases criminal or civil in which the Government may be a party or be interested, and he shall in like manner appear in the District Courts when requested so to do by the High Sheriff or the Sheriff of any one of the Islands", and §1014, that "he shall also be vigilant and active in detecting offenders against the laws of the Territory and shall prosecute the same with diligence." Even if the power to appoint deputies is not elsewhere conferred, it is certainly conferred by implication by §1013 and the power and the duty to detect and prosecute offenders is expressly granted by the two sections upon the deputies as well as upon the superior. That §1021 expressly authorizes the appointment, under certain circumstances, of a deputy for any judicial district does not militate against these views. The leg-

islature, it may be added, has for many years recognized the existence of the power to appoint a deputy attorney general by making successive appropriations of a salary for that officer.

The plaintiff further contends that the statute is not sufficiently broad to cover such a case as that disclosed by the evidence. The statute (P. L., §255) reads: "Whoever corruptly gives or promises to any executive, legislative or judicial officer, or to any master in chancery, juror, appraiser, referee, arbitrator or umpire, any gift, gratuity, service or benefit, with intent to influence his vote, judgment, opinion, decision or other acts as such in any case, question, proceeding or matter pending, or that may by law come or be brought before him in his capacity as aforesaid, shall be punished by imprisonment at hard labor not more than two years, or by fine not exceeding five hundred dollars." The argument is that the words "come or be brought *before* him" disclose an intention to refer to only such officers as have to *decide* matters, although it seems to be conceded that the section is not limited in its operation to *judicial* officers but may include some executive officers, as, for example, the High Sheriff, and legislators, passing upon certain questions in the exercise of their duties. *Executive* officers are expressly mentioned in the section. There is no limitation that the intent shall be to influence the judgment, opinion or decision of the officer but in express words it is made to appear that the intent may be to influence "other acts" and not only in any "case" but also in any "question, proceeding or matter" pending or that may "come or be brought before" the officer as such. When the attention of a prosecuting officer is called to an alleged violation of a penal statute, the "question" or "matter" of the prosecution of the alleged offenders "comes" or is "brought before" him and must be decided and acted upon by him. An attempt by a promise of a gift of money to influence such officer, before the intended commission of the offense, in his decision and action in such matter, falls within the language and scope of the section and is punishable under its provisions.

6. That the only relevant evidence presented to the trial

jury against the plaintiff in error was the uncorroborated evidence of a confessed accomplice, then under indictment for the same offense. A conviction based upon the uncorroborated testimony of an accomplice is legal. *The King v. Wo Sow*, 7 Haw. 734, 737; *Republic v. Edwards*, 11 Haw. 571-573. Moreover, corroborating testimony was given by Mr. Peters and by the witness Ah Kum. It is also argued that there was an abuse of discretion in the court's failure to advise or caution the jury against convicting on the uncorroborated testimony of the accomplice, but this point is not assigned as error and cannot be considered.

7. That the trial court refused to allow an examination of Ah Kum as to his qualifications as a witness. The witness before being sworn was examined to some extent as to his understanding as to the nature of an oath by counsel for the defendant. The prosecuting officer then noted an objection, which was sustained and the clerk was ordered to administer the oath to the witness. An exception was noted but no desire was expressed to examine the witness any further as to his qualifications. We find no error in the ruling.

8. That the trial jury was allowed to consider the testimony of a confessed perjurer, Ah Kum. The witness named testified on the direct examination that the defendant and himself had been shareholders in a certain *pakapio* bank called the Tuck Lee Bank and on cross-examination that in the trial of another case he had stated under oath that he did not know anything about the Tuck Lee Bank. Whether the fact testified to was material in the former case does not appear. The witness has not been convicted of the offense of perjury now claimed by plaintiff in error to have been committed on the occasion referred to. Because a person has committed perjury as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath. He is not, in the absence of a statute to the contrary, thereby rendered incompetent as a witness. The fact that on a former occasion he swore falsely simply goes to his credibility. See *The King v. Teal*, 11 East 307,

311. Section 1412, C.L., does not declare one incompetent as a witness who has committed but has not been convicted of perjury.

9 and 11. These assignments relate to rulings as to the admissibility of evidence and to instructions given to the jury. No instructions were requested at the trial by the accused nor were any objections or exceptions made or noted by him to those given. We find no reversible error.

The writ is dismissed.

J. A. Matthewman for plaintiff in error.

M. F. Prosser, assistant attorney general, for defendant in error.

DISSENTING OPINION OF GALBRAITH, J.

I cannot concur in the foregoing opinion and judgment of the majority of the Court.

Section 255, under which the charge is laid is found in Chapter 29, Penal Laws, entitled, "Obstructing the Course of Justice" and reads as follows: "Whoever corruptly gives or promises to any executive, legislative or judicial officer, or to any master in chancery, juror, appraiser, referee, arbitrator or umpire, any gift, gratuity, service or benefit, with intent to influence his vote, judgment, opinion, decision or other acts as such in any case, question, proceeding or matter pending, or that may by law come or be brought before him in his capacity as aforesaid, shall be punished by imprisonment at hard labor not more than two years, or by fine not exceeding five hundred dollars."

The charging part of the indictment alleges that the defendant "unlawfully, feloniously and corruptly, to one Emil Cornelius Peters, then and there being an executive officer of the Territory of Hawaii, to-wit: a deputy Attorney General of the Territory of Hawaii, with intent in him the said Taing Kai thereby to influence him, the said Emil Cornelius Peters, in his acts as such deputy Attorney General in proceedings that might by law come and be brought before him, the said Emil Corne-

lius Peters, in his capacity as said deputy Attorney General, to-wit: criminal prosecutions by the Territory of Hawaii against the said Taing Kai, and others associated with him, the said Taing Kai, whose names are to the grand jurors unknown, for the offense of maintaining and conducting at Honolulu, Island of Oahu, Territory of Hawaii, a lottery known as paka pio, a sum of money, to-wit: the sum of fifteen hundred dollars, as a gift and gratuity and benefit did promise contrary to the form of the statute in such case made and provided."

Evidently it was intended to charge that deputy Attorney General Peters is an executive officer of the Territory and that the defendant intending to influence him in his official capacity in certain criminal prosecutions by the Territory against the defendant and others did promise a gift or gratuity. This is certainly the most favorable light in which this indictment can be viewed still it does not charge a crime under the law of this Territory or an attempt to obstruct "the Course of Justice". The defendant might have admitted the truth of every thing charged in the indictment and still insisted that he was guiltless of any offense against the law. He had a right to promise the deputy Attorney General a gift or gratuity with intent to influence his official conduct provided he did not intend thereby to seduce him from the performance of some official duty. This indictment fails to allege whether or not the defendant intended to induce the deputy attorney general to be good to him and to pursue his enemies in these criminal proceedings, either pending or impending, or whether he wanted to induce the deputy Attorney General to dismiss or refrain from prosecuting proceedings against the defendant and his countrymen and to prosecute with vigor "the stranger within our gates" or the white man caught tempting the chinese goddess of chance. In other words it fails to charge the defendant with any criminal act.

This indictment has the same weakness and is bad for the same reasons as that in the case of *The Republic v. Young Hee*, 10 Haw. 114, 116. What the Court said in that case is applicable to this. "The proceeding or matter should be described.

The court should be apprised of the nature of the matter in reference to which the acts of the officer were intended to be influenced by the bribe. The acts to be criminal should be of a nature to pervert or obstruct the course of justice if the officer was influenced by the bribe. The indictment should have set them out, for if they were not to accomplish a corrupt purpose it would not be criminal to give a gratuity to influence the officer to do them or to refrain from doing them. The words of the statute have been followed in the indictment, but they are general words and require a fuller statement of the nature of the purpose which the bribe was intended to subserve."

The circuit court was clearly in error in charging the jury that the deputy Attorney General was an "executive officer" within the meaning of Section 255 Penal Laws. One of the authorities cited in support of the instruction, *State v. Currie*, 35 Tex. 17, holds that a County Attorney under a statute against bribing "legislative, executive and judicial officers", is a judicial officer. Under our statute the deputy Attorney General has no duties prescribed by law. He is a deputy to the Attorney General who is responsible "for all the acts of such deputy or deputies". (Sec. 1021, C.L.) We know as a matter of law that no criminal prosecutions can "by law come or be brought before him in his official capacity". He is not a judicial officer. When he appears for the Territory in criminal cases these proceedings cannot be said to "come or be brought before him". If he turns detective or policeman or constable and hunts up violators of the law and files complaints in the District Court he would not then be working as deputy Attorney General and even then these proceedings would not "come or be before him" as deputy Attorney General. They would be before the District Court and at no time in the history of their course from the first arrest until the jail door closes behind the culprit could the proceedings properly be said to be before the deputy Attorney General. The deputy Attorney General is not an officer with independent duties to perform. He is a subordinate and is given no authority to act independently.

He acts for and under the Attorney General who is responsible for his acts. The promising a gift or gratuity to the deputy Attorney General could not possibly constitute a crime under this section of the statute.

In the third instruction to the jury the Circuit Court extended the issues and submitted to the jury for determination issues not presented by the indictment. This instruction reads:

"I instruct you, Gentlemen of the Jury, that the crime as set forth in this indictment is complete without the tender or the production of the money, and the party who offers or promises the same is guilty whether the money constituting the bribe is to come from himself or from another: therefore, if you believe from the evidence, beyond a reasonable doubt, that Taing Kai promised to Mr. Peters, as deputy Attorney General, the sum of fifteen hundred dollars a week or any other sum in return for which the Attorney General's office or Mr. Peters as deputy Attorney General, was to insure the said Taing Kai or his associates from prosecution or punishment for conducting a lottery, or the game of paka pio, then the defendant is guilty as charged in the indictment, and it is your duty to convict him." This instruction charges the defendant with a crime if the indictment does not. The indictment did not charge the defendant with promising a gift or gratuity to the deputy Attorney General with intent to influence the "action of the Attorney General's office", or with the understanding that Mr. Peters, or any one else "was to insure" the defendant from "prosecution or punishment", nor did it charge that the defendant offered a gratuity or gift of fifteen hundred dollars per week, still the jury are instructed if they believe from the evidence beyond a reasonable doubt that he did this it was their duty to find him guilty. Under this instruction what became of the constitutional guarantee that "No person shall be held to answer for an * * * infamous crime unless on a presentment or indictment of a grand jury"? It was certainly frittered away, and the defendant was held to answer and possibly was convicted of an infamous crime

on charges not contained in an indictment but in the instruction of a Circuit Judge to the jury. For the errors of this charge alone the judgment of conviction should be set aside and the defendant discharged.

I am impressed with the conviction that there was great haste exhibited to land this Chinaman in prison for some undisclosed reason. The indictment was returned May 14, charging the alleged offense May 10, and he was tried and convicted May 27. Whether or not he was ever arraigned or plead to the indictment the record here does not disclose. At any rate there seems to have been a prevalent desire to speed the defendant along to the reef. The counsel who then appeared for him offered very little resistance to the fulfilment of this desire, in fact the inference that he shared in the desire might be justified from his line of defense and the feebleness with which the same was presented.

It may be important to the public service and to the safety and security of the Attorney General's department that a "horrible example" be made of this defendant in order to deter others from walking in his steps but none of these things in my opinion are of so great importance as the orderly administration of the law, the proper conviction of those guilty of crime according to the well settled rules of procedure.

This defendant was not charged in the indictment with a crime, although he was so charged in one of the court's instructions to the jury, and therefore could not have been properly convicted. He having been improperly convicted and sentenced to penal servitude this Court ought to set aside such conviction and sentence and restore him to liberty again.

ANTONE BRIGHT *v.* DAVID KAWANANAKOA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 16, 1904.

DECIDED MAY 4, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The evidence held sufficient to support a finding that there was no express agreement between an employer and employee as to the rate of compensation for the services to be rendered.

OPINION OF THE COURT BY PERRY, J.

Assumpsit, on a *quantum meruit*, for \$850 for seventeen months' work and labor done. Answer, general denial. There was evidence tending to show that the plaintiff had been employed by Queen Kapiolani in her lifetime to take charge, as supervising retainer, of her land of Mokauea, Kalihi, that the compensation for the services so rendered was to be the use, free of rent, of a quarter-acre of land and certain other perquisites and that such perquisites were enjoyed by plaintiff not only during the Queen's lifetime but also during the succeeding period during which the compensation sued for is claimed to have accrued. The issue left to the jury was whether, as contended by the defendant, his employment of the plaintiff, if such employment was found, was a continuation of the employment commenced under Queen Kapiolani (presumably by this was meant, for the same compensation), in which case the verdict was to be for the defendant, or, as contended by plaintiff, was a mere hiring without any agreement as to compensation, in which case the verdict was to be for the plaintiff for the reasonable value of the services rendered. The jury found for the

plaintiff for \$450. The sole question raised by the exceptions relied on is whether there is sufficient evidence to support the verdict.

It is true, as contended by the defendant, that the plaintiff himself testified that on one occasion, after the publication of the administrator's notice to creditors of the deceased Queen, the defendant told him to "continue to work under the old system, and I continued to do my work again" and that in a bill in equity filed in April, 1901, the plaintiff made averments tending to show that the employment after the Queen's death was under the same terms as that prior thereto. Certainly a strong showing was made in support of the defendant's claim on this issue of fact. Nevertheless we cannot say that there was not evidence sufficient to support a finding that, while the defendant employed the plaintiff to continue to do the same work, no express agreement was made by the parties as to the rate or method of compensation. At another point in his testimony the plaintiff said: "I started to work in 1897, the Queen put me in charge of that place, and when she died the Prince" (defendant) "called me and gave me the orders to remain and do the same work. * * * The Prince told me" (on the day after the Queen's death) "to go and tell the natives to get the pigs ready and for us to remain on the land until everything was quieted down. * * He told me nothing else. I went home and obeyed." The view might well have been taken that the plaintiff's testimony was inconsistent and discredited by the averments in his bill in equity. The jury, however, the sole judge of the credibility of the witnesses, saw fit to believe upon all the evidence that no express agreement was made as to compensation. The finding cannot be set aside.

Other contentions of the defendant are that the evidence showed a contract with the Queen and not with the defendant, that at best the promise of defendant was to pay the debt of another, that the land of Mokauea was not the defendant's, and that in any event the defendant was not liable. The defendant had an interest in the land and if he saw fit to do so could em-

ploy the plaintiff to work there and render himself liable for the latter's compensation. There was evidence, as already stated, tending to show a hiring by the plaintiff personally and if there was such hiring, the debt created was not the Queen's but the defendant's.

The bringing of the suit in equity which was later dismissed on demurrer on the ground of lack of jurisdiction or because a cause of action was not stated, does not estop the plaintiff from suing at law.

The exceptions are overruled.

J. M. Vivas and C. C. Bitting for plaintiff.

Kinney, McClanahan & Cooper for defendant.

In re CLINTON J. HUTCHINS, Trustee.

ORIGINAL.

SUBMITTED APRIL 21, 1904.

DECIDED MAY 4, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Sec. 17, Act 32, Laws of 1903, relating to executions pending appeals, applies to proceedings for summary possession as well as to other proceedings.

Under that section, execution cannot issue pending appeal unless upon good cause shown and an opportunity given to stay execution by filing a supersedeas bond.

In passing upon the question of issuing an execution in such case, the magistrate acts judicially, and certiorari lies in case he issues execution without allowing the defendant a hearing or an opportunity to file a supersedeas bond.

OPINION OF THE COURT BY FREAR, C.J.

The second District Magistrate of North Kona, Hawaii, rendered judgment for the plaintiff in a summary proceeding for possession brought by the Kapiolani Estate, Limited, as landlord, against Clinton J. Hutchins, trustee, and the Henry Waterhouse Trust Company, Limited, as tenants. The defendants appealed to the Circuit Court of the Third Circuit, jury waived. Thereafter the Magistrate issued execution, namely, a writ of possession, at the instance of the plaintiff without notice to the defendants or an opportunity on their part to be heard or to give a supersedeas bond under C.L., Sec. 1435, as amended by Sec. 17 of Act 32 of the Laws of 1903, whereupon this petitioner, one of the defendants in that proceeding, petitioned for this writ of certiorari directing the magistrate to send to this Court a copy of the proceedings had in his court subsequent to the appeal, which he has done. The Magistrate now moves to quash and dismiss this writ on the grounds that the petition therefor fails to state facts sufficient to authorize its issuance and that a writ of possession may issue under the provisions of the summary possession statute irrespective of the provisions of said Sec. 17 of the Act of 1903, which relates to supersedeas bonds, etc., on appeals in general from Magistrates.

If, as we hold, Sec. 17 of the Act of 1903 applies, the motion must be overruled and it will be unnecessary to pass upon several other questions that were argued on the possibility that the Court might hold that execution might have issued irrespective of said Sec. 17.

The respondent's contention is that the landlord and tenant statute (C.L., Secs. 1679-1688) from its very nature as a summary possession statute and in view of its special provisions and the practice under similar laws elsewhere, permits execution to issue notwithstanding an appeal, and that a stay of execution may be effected (under Sec. 1688) in a case of this nature pending an appeal only by giving a bond for rent to accrue when the proceeding is brought on the ground of nonpayment of rent.

This statute appears to have been taken largely from similar statutes elsewhere, and yet there are such differences that it is unsafe to give much weight to the points of similarity. Most other statutes of this kind allow an appeal and many allow a supersedeas. The statute formerly contained a special provision (Civ. Code, Sec. 948) allowing an appeal to be taken in a case of this kind within twenty-four hours, provided a bond were filed for the prosecution of the appeal without delay. Immediately following that section was the present Sec. 1688 of the Civil Laws, providing that in case of judgment for the plaintiff when the defendant was proceeded against for the non-payment of rent, the latter should not be allowed to keep possession and take his appeal without giving a bond for rent to accrue in case it should finally be determined that the plaintiff was entitled to possession. Whether, construing those two and other sections together, the last mentioned section should be regarded as permitting a stay in the particular case on the assumption that otherwise there would be no stay in any case, or as preventing a stay in the particular case unless a bond were filed for rent to accrue on the assumption that otherwise there would be a stay in all cases, we need not decide. The section (C.C., Sec. 948) providing for the appeal was repealed by the Laws of 1892, Ch. 57, known as the judiciary act, which provided (C. L., Sec. 1430, since amended) for appeals "from all decisions of District Magistrates in all matters" and (C.L., Sec. 1435) that an appeal in any cause provided for in that act should operate as an arrest of judgment and stay of execution, with a proviso that execution might issue pending such appeal upon good and sufficient cause being shown therefor. By the amendment of this last mentioned section by Sec. 17 of Act 32 of the Laws of 1903, it was provided that an appeal in any case from a District Magistrate should operate as an arrest of judgment and a stay of execution, with a proviso that the Magistrate might, upon good cause shown, allow execution to issue pending the appeal unless a bond should be filed, conditioned for the prosecution of the appeal and the performance of the judgment.

It was evidently the intention to provide by Act 57 of the Laws of 1892 that appeals in cases of this kind should thereafter be taken as in other cases. The provision (C.L., Sec. 1430) of that act allowing an appeal is now the only provision under which an appeal can be taken in a case of this kind, and Sec. 17 of the Act of 1903, amending C.L., Sec. 1435, of course applies to appeals under Sec. 1430. Accordingly, execution could not properly be allowed except upon good cause shown by the defendant and after failure of the defendant to file a supersedeas bond within a time fixed by the Magistrate. The defendants were entitled to a hearing and, in case good cause were shown for execution, an opportunity to stay execution upon filing a bond. Of course, if the petitioner came within one of the excepted classes mentioned in Sec. 17, it would be unnecessary to file such a bond in order to stay execution.

It is conceded that if Section 17 applies, the functions of the Magistrate in the matter of allowing an execution pending an appeal are sufficiently judicial, as distinguished from ministerial, to support certiorari.

The motion to quash and dismiss the writ is denied, and the respondent given five days in which to answer.

Cathcart & Milverton for petitioner.

Kinney, McClanahan & Cooper for respondent.

I concur in the order overruling the motion to dismiss for the reason that the motion is in the nature of a demurrer and admits the facts set out in the petition and these facts being admitted the grounds of the motion are not well taken.

C. A. GALBRAITH.

LUCY K. PEABODY *v.* S. M. DAMON, J. O. CARTER, W.
F. ALLEN, C. M. HYDE and W. O. SMITH, TRUS-
TEES under the Will of B. P. DISHOP, Deceased.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 21, 1904.

DECIDED MAY 5, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

An issuance of execution for costs on the day of entry of judgment for the defendants in an action to quiet title and its return the next day as satisfied by the payment of the costs by the plaintiff, will not prevent the plaintiff from having a writ of error thereafter within the time allowed by the statute. In such cases, judgment is not fully satisfied within the meaning of C.L., Sec. 1443.

Service of an assignment of errors need not be made on one named as a defendant, nor need the return account for failure to serve him, when the record shows that he had died before the commencement of the action in the lower court. In such cases, C.L., Sec. 1453 does not apply.

C.L., Sec. 1453, does not provide for substituted service of an assignment of errors. C.L., Sec. 1219, requires a return of service, including substituted service, to be indorsed on the paper served. Under neither provision, therefore, was it proper for the officer, after making return of service of the assignment on three defendants, to file an affidavit that he had afterwards made substituted service on a fourth defendant, and such affidavit may be stricken from the files.

When an officer has returned service of an assignment of errors on three defendants on the day of the issuance of the writ and has made an unsuccessful attempt to serve a fourth defendant or to make a proper return thereof within twenty days thereafter, further opportunity may be given to make a proper service or return thereof.

OPINION OF THE COURT BY FREAR, C.J.

The action in the Circuit Court was one to quiet title. The trial judge directed a verdict for the defendants, which was rendered, and a judgment was entered thereon for the defendants. The defendant, C. M. Hyde, had died before the commencement of the action, but the remaining defendants appeared generally. On the day on which judgment was entered these defendants took out execution for \$8.50 costs in the action and for costs of execution, but the execution was returned satisfied the next day upon the plaintiff's paying the costs. The plaintiff thereafter, on November 19, 1903, sued out this writ of error, which was returned by the clerk of the Circuit Court with the record in the action to quiet title, but the officer's return of service of the assignment of errors showed service upon only three of the defendants, namely, S. M. Damon, J. O. Carter and W. O. Smith, who thereupon appeared specially, on November 25, and moved to quash the writ for want of service on the defendants Allen and Hyde and on the ground that execution had been fully satisfied, and served notice that the motion would be presented on November 30. The motion went over by consent to December 5, when the plaintiff filed an affidavit by the officer, entitled "amended return of service", to the effect that on November 30, at 9:45 a. m., he had served the assignment, etc., on the defendant, W. F. Allen, by leaving a copy thereof at his residence with a servant of his, he being then, as the deponent was informed and believed, absent from the Territory. The four defendants then, appearing specially, filed a second motion to quash the writ on the same grounds as before, and also that the amended return be stricken from the files on the ground that it was unauthorized by law and of no effect.

The contention that the plaintiff was precluded from suing out this writ on the ground that execution was fully satisfied, cannot be sustained. It is true that a writ of error may be had only before execution is fully satisfied (C.L., Sec. 1443), and that no reversal on error can affect the validity of a sale on

execution prior to the service of the assignment of error (*Id.*, Sec. 1455), but has execution been fully satisfied within the meaning of the statute? Perhaps so as to costs, but not as to the title to the land. Assuming that the defendants were in possession, as they probably were, and that the execution for the costs was the only execution that could be issued, still as a matter of fact no execution has been issued or satisfied in respect to the title to the land, which was the subject of the suit, the costs being a mere incident, and a plaintiff would not be precluded from obtaining a writ to correct errors in a judgment merely because execution for costs was satisfied any more than he would be precluded if there had been no costs and therefore could be no execution for them. Apart from the statute, the payment of costs cannot under the circumstances operate as a voluntary waiver of the right to a writ of error. See *State v. Martland*, 71 Ia. 543.

It was unnecessary to serve C. M. Hyde, though he was named as a defendant. He had died before the commencement of the action and never was a party to that action. The statute (C.L., Sec. 1453) which requires service "upon the defendant in error or upon the personal representative of a deceased party" has no application as to him. True, the petition for this writ does not show his death nor does the officer's return as to the service of the assignment of errors show that, but the record returned to this Court by the clerk of the Circuit Court in obedience to the writ, and upon which this motion is based, shows it. That record is now before this Court. Service on the defendants was not a prerequisite to bringing the record here. The writ goes to the clerk or judge of the lower court. The clerk or judge returns the record to this court. This Court acts on the record. Service on any defendant is necessary merely to enable the court to dispose of the case as to him, because he is entitled to a hearing before his rights can be affected. But if, as is the case here, the record shows that he never was a party, though he was named as a defendant, and that he is not entitled to a hearing, the court may act without notice to him.

As to service on the defendant Allen, it will be sufficient to say that, if Secs. 1218-1221 of the Civil Laws were applicable, as counsel on both sides seem to concede, but as to which we express no opinion, still, the summons, petition, assignment of errors, and notice to defendants having been returned into court after service on three of the defendants, it was not proper for the officer, after subsequently leaving copies at Allen's residence, to make a return in the shape of an affidavit as to his doings therein, inasmuch as Sec. 1219 requires that "in all cases where process * * * or any complaint, order or citation be served * * * a record thereof shall be indorsed upon the back of such process, complaint, order or citation." If on the other hand only Section 1453, above referred to, applies, there could be no substituted service at all on Allen. The motion that the so-called amended return be stricken from the files is accordingly granted.

It does not follow, however, that the motion to dismiss the writ of error should be granted absolutely. There is no statutory requirement that service of the assignment of errors and notice that a writ of error has issued should be made on all the defendants within any specified time. As already stated, this writ of error has been returned and the record is here, and it is provided merely that "no hearing shall be had on a writ of error until twenty days after service" of the assignment of errors and notice that a writ of error has issued. The plaintiff should be given an opportunity to have proper service made on this defendant and a proper return made of such service, especially as the return of service on only three of the defendants was made on the day on which the writ was issued and the attempted substituted service and attempted return thereof were made less than twenty days thereafter. We need not attempt to state what course should now be pursued in order to procure service on this defendant or what course should be pursued in case personal service cannot be made on him.

The writ will be dismissed unless the plaintiff within ten

days takes proper steps to enable the court to proceed to a hearing as to defendant Allen.

E. C. Peters for plaintiff.

Kinney, McClanahan & Cooper, S. H. Derby and Holmes & Stanley for defendants.

IRENE B. CORNWELL *v.* JOHN F. COLBURN.

APPEAL FROM DISTRICT MAGISTRATE, HONOLULU.

SUBMITTED MARCH 7, 1904.

DECIDED MAY 6, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Where a forfeiture of a term is claimed for a breach of a condition to pay taxes it is not error to admit evidence of the amount of taxes assessed, when the same became delinquent and the amount of the penalty incurred.

The lessee covenanted "to pay all taxes and assessments levied or assessed against the demised premises" and one of the "express conditions" in the lease, was that in case of "the breach of any of the covenants to be observed by the lessee, the lessor, after ten days default", may * * * "without any notice or demand enter into and upon the land and thereby determine the estate hereby created", and in a suit for summary possession for breach of this condition, *Held* that it was not necessary for the lessor to pay the taxes or to demand that the lessee pay them before insisting on the forfeiture thereby accruing.

OPINION OF THE COURT BY GALBRAITH, J.

This was a statutory action for the summary possession of leased premises on account of breach of conditions in the lease. The complaint alleges, "That the said defendant is now unlawfully in possession of those certain premises in Honolulu afore-

said, being a portion of Royal Patent Grant 368 to E. Smith, having a frontage of 100 feet on Kinau street and running back 150 feet, and being lot 157 on the Government map, as described in that certain lease from Irene M. Long, now Irene B. Cornwell, dated Sept. 7, 1898, a copy of which lease is attached hereto and made a part hereof marked A; and plaintiff says that said defendant now holds said premises without right in consequence of the determination of such tenancy by reason of a forfeiture under the terms and condition of said lease, to-wit: (1) by the failure of the defendant to pay the plaintiff for ten days after the same became due the sum of \$75, being rent for said premises under the terms of said lease due September 1, 1902, \$37.50, and March 1, 1903, \$37.50; and (2) by a breach by defendant of a covenant in said lease to pay all taxes assessed against said premises for the years 1901 and 1902; and by reason thereof plaintiff has terminated said lease and has notified defendant that said lease has been forfeited, whereby the tenancy theretofore existing under said lease became terminated."

The lease stipulated for the payment of an annual rental of \$75.00 payable semi-annually in advance and was for a term of twenty-five years from the first day of September, 1898. The lessee covenanted in the lease; (1) "that he will pay the annual rent semi-annually in advance", (2) "that he will pay all taxes and assessments levied or assessed against the demised premises during the term aforesaid", (3) "that he will not make or suffer any waste or any unlawful, improper or offensive use of the demised premises", etc. "Provided always, and these presents are upon these express conditions: That in case of the non-payment of the rent, or of a breach of any of the covenants to be observed on the part of the" lessee, the lessor, "after ten days' default in the payment of the rent reserved, or for the breach of any covenant herein contained, and while such neglect and default continues, without any notice or demand, may enter into and upon the land and thereby determine the estate hereby cre-

ated, and expel the" lessee or "those claiming under him, and such entry shall be a legal eviction."

The District Magistrate found for the plaintiff on the issues, holding that there was \$37.50 rent due and \$67.00 taxes and \$6.70 penalty unpaid and gave judgment for the plaintiff for possession of the premises.

The defendant appeals to this court on points of law. The first point set out is, that the complaint does not state a cause of action. Whether or not this point is now available in this manner as no demurrer or other objection was made to the complaint in the court below it is unnecessary to decide since it will be readily seen from the body of the complaint hereinbefore set out that it does state a cause of action under the statute. (2) Errors admitting evidence of taxation. Objection was made to the admission of evidence of the amount of taxes assessed against the premises and due and unpaid. The complaint set out a breach of condition of the lease in failure to pay the taxes. The lease, the contract entered into between the plaintiff and the defendant, provided that one of the express conditions on which the premises were held and for a failure to keep which a forfeiture would accrue was a failure to pay "all taxes that might be assessed against said premises." The payment of taxes may be made a condition of forfeiture of a term. *Byrane v. Rogers*, 8 Minn. 247; *Tate v. Crowson*, 28 N. C. 65; *Bowman v. Foot*, 29 Conn. 331; *Jackson v. Harrison*, 17 Johns. 66; *Bacon v. Park*, 19 Utah, 246; *Greenwell v. Silva*, 13 Haw. 697. This evidence was clearly competent under the issues and it was not error to admit it. (3) Another point relied on by the defendant is that there was no demand made for the rent on the premises on the day the same became due and therefore there could be no forfeiture for non-payment of rent. It is insisted that the common law rule on this question prevails here since there is no Hawaiian judicial precedent to the contrary and therefore in order to create a forfeiture for non-payment of rent the precise sum must be demanded and the demand must be made immediately preceding sunset on the due day, so that the money

may be counted and the necessary receipt or acquittance given, while there is light enough reasonably to do so and the demand must be made upon the land, and at the most notorious place of it, and at a dwelling house and at the front door of the house, unless a place of payment is mentioned, when it must be there demanded. The demand must in fact be made although there be no one upon the land ready to pay.

Whether or not, for the purposes of summary proceedings, under the statute, a demand for the rent under the common law rule is necessary before a forfeiture can be claimed, in the absence of any stipulation in the contract on the subject, it is not necessary to determine in this case, since the parties placed a stipulation in the lease expressly waiving a demand as a prerequisite for claiming a forfeiture for non-payment of rent.

4. That the evidence, as given before the District Magistrate, over defendant's objection, showed no cause for forfeiture on account of non-payment of taxes, for several reasons; (a) that the plaintiff failed to return the property for taxation, (b) that it did not appear that the plaintiff had paid the taxes or demanded payment by the defendant prior to the commencement of the suit, (c) that the plaintiff accepted the installment of rent due September 1, 1902, after the taxes for the year 1901 became delinquent and thereby waived her right of forfeiture on that ground.

It is sufficient answer to the first objection to state that the failure of the plaintiff to return the property did not relieve the defendant from his covenant to pay the taxes. He agreed to pay the taxes not if the plaintiff made proper return but in any event. As to the second objection it may be said that the covenant in the lease did not require the plaintiff to pay the taxes or to demand of the defendant that he pay them. The defendant knew his obligations under the lease and that he agreed to pay the taxes and that if he failed to do so a forfeiture would accrue. In regard to the last point it is possible that the law would imply to the plaintiff constructive notice of the fact that the taxes for 1901 were in default when she accepted the install-

ment of rent due September 1, 1902, although it is not claimed that she had actual notice, however, it is not necessary to decide this point, since there was no acceptance of rent after the taxes for 1902 became delinquent. These were delinquent and unpaid as well as the installment of rent due March 1, 1903, when the suit was commenced, August 21, 1903, and for such default a forfeiture of the term accrued under the covenants of the lease and the judgment for possession of the premises may be sustained.

It does not appear that any of the points relied on are well taken. The judgment appealed from is affirmed. It is so ordered.

Robertson & Wilder for plaintiff.

C. W. Ashford for defendant.

W. W. AHANA *v.* THE INSURANCE COMPANY OF
NORTH AMERICA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 20, 1904.

DECIDED MAY 14, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an action on a policy of fire insurance to which the defense was that the loss was caused by order of a civil authority, namely, the board of health, which by resolution condemned the buildings to be destroyed by fire because infected by bubonic plague, held
The board could execute its resolution through the fire department by in form authorizing as well as by in form ordering the latter to burn the buildings.

That a quorum of the board was present at the meeting at which the resolution was adopted appears from the fact that at least four of the seven members are mentioned in the minutes as having participated in the meeting.

The minutes of that meeting were properly admitted in evidence under the circumstances stated in the opinion although they were not signed.

To serve as a defense in a case of this nature, the action of the board need not be lawful and justifiable. It is sufficient if the board had authority to order buildings burned when necessary for purposes within the scope of its duties and acted in this particular case officially and in good faith and within the apparent scope of its powers.

It is within the discretion of the trial court, not subject to review except in case of abuse, to reopen a case for the introduction of further evidence.

A new trial will not be granted because of an erroneous instruction to the jury when it appears that the instruction did not affect the verdict.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for \$1,000 on a policy of fire insurance on two buildings that were burned, with other buildings, in what was known as block 9, in Chinatown, Honolulu, on January 16, 1900, the defense being, so far as need be considered on these exceptions, that the fire was caused by order of the board of health in the suppression of bubonic plague and so was a "loss caused directly or indirectly * * * by order of any civil authority", which is one of the losses excepted in the policy. The jury found for the defendant and the plaintiff brings here sixteen exceptions, which may be treated, as the plaintiff has treated them in his brief, under five heads.

1. The first exception was to the admission in evidence of a letter dated January 15, 1900, the day before the fire, from the president of the board of health to Andrew Brown, fire commissioner, as follows: "You are hereby authorized to destroy by fire all of the structures in 'Block No. 9'—bounded by Bere-
tania, Maunakea, Pauahi and Smith Sts. This is in accord-

ance with a resolution of the Board of Health condemning the said structures as being unsanitary and infected by plague and incapable of being disinfected by any other means than fire." The objection to this was that, since it merely authorized and did not order the burning of the buildings, it was a delegation of power from the board of health to the fire commissioner which, it is contended, was unlawful. The board had already passed the resolutions, as will appear under the next point, condemning the buildings. It would hardly be expected to destroy the buildings itself. It would naturally act through others in carrying out its resolutions of this kind. The fire department was the most appropriate body to perform this function, especially with a view to preventing a spread of the fire. The board had no authority over the fire department. It could not compel it to act. But it could ask its cooperation and give it as much authority by in form authorizing it as by in form ordering it to act. If the fire department accepted and acted on the request of the board it was sufficient to make its act that of the board, so far as the question now raised is concerned. It was immaterial through whom or by what means the board acted in carrying out its resolution. The board did not attempt or purport to delegate to the fire department or the fire commissioner the discretion as to whether the buildings should be burned.

3, 4, 5, 6, 7, 8. These exceptions raise the question of the admissibility in evidence of a book of minutes of meetings of the board of health for the purpose of showing the resolutions condemning the buildings in question. A number of the objections made to the admission of these records relate to the legality of the action of the board in condemning these buildings and will be considered under other exceptions. One objection was that there was not a quorum present at the meeting of January 10, 1900, at which these buildings were condemned. The minutes of that meeting besides stating in general terms that "the board met" etc., shows that at least four members participated by making or seconding motions and presumably there was a fifth member presiding. Four constituted a quorum, as the

board consisted of seven members. Other objections were that the minutes of that meeting were not signed by anyone, that they were not kept by anyone authorized to keep them, and that they were not the original minutes, being in typewriting. The book is a bound volume of typewritten minutes, signed at the end by the secretary of the board. The minutes of each meeting are not signed. The volume is labeled on its back "minutes of the board of health meetings, Jan. 1, 1899, to April 30, 1900", and on its first page the same except that "re bubonic plague" is inserted after "meetings". It was produced by the chief health officer of the board of health, who testified that it was the official record of the proceedings of the board of health during the period indicated; that these minutes were kept by the secretary, that the witness was present at the meeting in question and remembered the passage of the resolution, that the minutes of that meeting were taken by the assistant secretary; that for at least ten years it had been the practice not to sign the minutes, that they are typewritten and approved by the board before they are put into the book. The minutes of the meeting of April 3, 1900, state that the board approved the minutes of the meeting in question. There is no statutory provision as to how the minutes should be kept. In our opinion, these objections to the admissibility of the minutes were not well founded. Another objection was that it was not shown that the meeting in question "was properly set or organized by any process of the board of health or by any person who appeared to have authority of the board of health", by which is meant, as we understand, that it was not shown that the meeting was properly called or called for this purpose. The contention is that this appears from the recital in the minutes that the board met "pursuant to the resolution passed at yesterday's meeting to visit and formally decide what to do with block 10," and that no such resolution appears in the minutes of the meeting of the day before. Without going into the question whether these things would be sufficient to invalidate the proceedings as between the board and one affected by its action, it is sufficient to say that the action appears

to have been taken by the board or a quorum thereof as such and in the usual manner, and that was all that was required for the purposes of a case of this kind, as will appear under the next point.

4, 9, 10, 13, 14, 15. The argument under these exceptions is that the action of the board was unlawful and unjustifiable in that it was unnecessary to destroy the buildings, that they could have been put in good sanitary condition, that they were condemned without giving the owner an opportunity to be heard, etc. These arguments were considered and disposed of adversely to the plaintiff's contention in *Hawaii Land Co. v. Lion F. Ins. Co.*, 15 Haw. 164, where it was held that in a case of this kind the order of the civil authority need not be lawful or justifiable, but that it is sufficient if the civil authority may lawfully order buildings burned when necessary for purposes within the scope of its duties and acts in the particular case officially and in good faith and within the apparent scope of its powers.

2. When the defendant rested, the plaintiff moved for a directed verdict on the ground that the resolution of the board of health had not been shown. The defendant's counsel then stated that he had omitted to put the resolution in evidence and was under the impression that he had done so and asked that the case be reopened for that purpose, which was allowed and the plaintiff then took this exception. The reopening of a case for the introduction of further evidence is a matter within the discretion of the trial court and the exercise of such discretion will not be disturbed except in case of abuse—which does not appear here. *Herblay v. Norris*, 8 Haw. 335; *King v. Heleliili*, 5 Haw. 16.

11. This exception was taken to the instruction of the court that "the plaintiff must prove that the peril assured against and not one of the causes excepted by the policy was the cause of the loss, otherwise your verdict must be for the defendant." If this means that the burden was on the plaintiff, after showing a loss by fire which was the peril insured against, to show further that the fire was not produced by one of the causes excepted in

the policy, it was erroneous. The only case cited in support of that view is *Pelican Ins. Co. v. Troy Coop. Ass.*, 77 Tex. 227, but in a later case in the same state the court of appeals declined to follow that case on the ground that if it went as far as contended it was bad law and contrary to the great weight of authority. *Burlington Ins. Co. v. Rivers*, 28 S. W. 453. See also cases cited in 11 Enc. Pl. & Pr. 414, notes 1 and 3. The question then is whether the giving of this instruction was prejudicial or reversible error. While the presumption is that error was prejudicial, yet if the contrary clearly appears, there should be no reversal. Such we believe to be the case here. The jury decided the case on the theory that the burden was on the defendant to bring the case within the exception of a loss caused by order of a civil authority and found that it had affirmatively proved that. This is shown by the proceedings that took place after the jury returned into court for further instructions and finally by their verdict, which reads as follows: "We, the Jury, in the above entitled cause find for the Defendant in view of the facts presented by counsel more particularly the fact that the records of the Bd. of Health of the 10th of Jany. 1900 show that the resolution authorizing the destruction of Block 9 was duly passed by a quorum of the Board of Health there assembled." Why the jury did this we cannot say—whether because no prominence was given to the proposition set forth in this instruction or because the jury did not construe it in the way counsel now construes it, or because the jury acted under other instructions which were directly to the contrary and unambiguous, as for instance, "You are instructed that if there has been a failure of proof in this case on the part of the defendant to show that the property in question was destroyed by order of the civil authorities you must find for the plaintiff."

The exceptions are overruled.

J. A. Magoon and *J. Lightfoot* for plaintiff.

Robertson & Wilder for defendant.

C. M. COOKE v. THE TREASURER.**MOTION FOR REHEARING.**

SUBMITTED APRIL 21, 1904.

DECIDED MAY 14, 1904

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The stamp duty, payable under Sec. 941, C.L., is assessed upon the deed of conveyance and the consideration therein expressed and not on the separate considerations for several contracts set out therein. The assessment is not on the contracts or necessarily on the considerations therefor.

A rehearing is denied.

OPINION OF THE COURT BY GALBRAITH, J.

The grounds set out in the motion and petition for rehearing, with an elaboration of detail, not necessary to enumerate, are that the court in the decision filed in this case, *ante* pp. 409, 410, 411, was in error both as to the facts and the law. It is also contended that the court overlooked certain points duly submitted by counsel.

A brief statement of the facts is as follows: The mortgagee sold a tract of land taking a mortgage for the unpaid purchase money and upon default in the conditions of the mortgage foreclosed under a power therein contained by public advertisement and sale. At the time of the sale the balance due on the purchase money was \$62,300.00 and the land which had been divided into lots and blocks was sold in separate parcels, the attorney for the mortgagee buying each tract. The sum of the several purchases aggregated the amount due under the mortgage. To effectuate the several contracts of sale and to convey the title to

the land back to the mortgagee one deed of conveyance was executed reciting the total consideration of sixty two thousand and three hundred dollars followed by a recital that this sum was the aggregate of the several purchases and setting out each separate tract and the amount bid therefor.

It is immaterial what the purpose of the conveyancer was in drafting the deed in this form. There should be no disagreement about the facts. They are not disputed. The only question presented is one of law, namely, whether the stamp duty should be calculated on the consideration recited in the deed, or instrument, or on the separate considerations of the several contracts of sale recited therein and going to make up the whole.

It is contended that the "instrument" under consideration "contains distinct matters" and was "made for more than one consideration" and under section 923, C.L., the stamp duty should be assessed upon each matter or consideration separately. In other words that the stamp duty should be assessed upon the separate considerations for the several tracts of land as enumerated in the deed of conveyance.

This contention is not sound for the reason that the stamp duty is not assessed upon the contracts of sale or the considerations therefore (Sec. 941, C.L.) but is assessed upon the instrument, in this instance upon the deed of conveyance, and the consideration therein expressed.

Again the "instrument" in this case does not contain "distinct matters" and was not "made for more than one consideration" within the intent and meaning of section 923 as illustrated by the decision of the court in *Minister v. Castle*, 8 Haw. 105, wherein the "distinct matters" and the "more than one consideration" were a lease, and an executory agreement for the sale of fire wood and the considerations therefor. If the "distinct matters", as may be contended, refers to the consideration for the instrument and not to the recitals it may contain, then the only consideration expressed in this deed is a money consideration, namely, \$62,300.00 and this is "the consideration therein

expressed" and not the several sums therein set out as going to make this aggregate amount.

In this instance the "consideration therein expressed" is not many but one, it is not the two hundred dollars bid for one lot or the five hundred dollars bid for another but the sum of all the bids, the aggregate consideration, namely, sixty two thousand and three hundred dollars. This conclusion cannot be affected by the fact that this consideration is formed by adding together several smaller sums any more than it would be if a part of it were paid in gold coin, and a part in paper currency.

The consideration for each of the contracts of sale recited in the conveyance was the respective sum bid for each tract and for which it was sold and the consideration expressed in the instrument, or deed of conveyance, is the sum of all these, namely, sixty two thousand and three hundred dollars and on this amount the stamp duty should be assessed.

We are reassured by this reexamination that the conclusion announced in the former decision was correct and therefore deny the motion for rehearing.

C. F. Clemons and D. H. Case for motion.

L. Andrews, Attorney General, contra.

THE BANK OF HAWAII, LIMITED, *v.* W. C. PARKE.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 9, 1904.

DECIDED MAY 23, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Under the statute, an order of default cannot properly be entered against a garnishee for failure to appear and answer at the opening day of the term to which the summons is returnable. No written answer is required of the garnishee. He may appear and make his disclosure orally under oath at the trial or at any time before the trial.

Such order of default should be set aside on the garnishee's motion made between the first and second days of the trial, and a final default judgment against the garnishee should not be entered for his failure to appear and offer to disclose while that order remained unreversed.

OPINION OF THE COURT BY FREAR, C.J.

The object of this writ is to obtain relief from a judgment of default against The Bank of Hawaii, Ltd., as garnishee, in an action brought by W. C. Parke against another. That action was begun June 5, 1903, and service was made on the same day upon the defendant therein and the garnishee. The summons was for August 3, the first day of the August Term under the then existing statutes. On August 1, a new act took effect changing the commencement of the term to September 7. On October 9, on plaintiff's motion, an order of default was entered against the garnishee as follows: "It appearing to this court that the garnishee The Bank of Hawaii, Ltd., has been regularly

served with summons herein and has failed to appear or to answer plaintiff's complaint and that the legal time for appearing and for answering said complaint has expired, it is ordered and adjudged that the garnishee The Bank of Hawaii, Ltd., is in default and is charged as garnishee with the amount of such judgment and costs as plaintiff may recover of the principal defendant John W. Cathcart as its own proper debt." On November 27 trial between the plaintiff and defendant was begun before a jury, resulting in a verdict against the defendant for \$556.10 on November 30, to which day the case was continued from November 27. The garnishee filed a motion, dated November 30, marked filed November 30, but recited in the bill of exceptions as filed November 28, to set aside the order of default, which motion was set for hearing on November 30, a half hour before the trial was to proceed. On that day an amendment to the motion was filed and, at plaintiff's request, the hearing of the motion was continued until December 1. On the same day a stipulation between the plaintiff and the garnishee was filed continuing the hearing until December 3. The hearing was had on December 4, when, after being further amended, the motion was denied. On December 8, judgment was entered against both the defendant and the garnishee.

It is assigned as error that the trial judge or court erred: (1) in making the order of default; (2) in denying the motion to set aside the order; and (3) in entering judgment against the garnishee.

If the order of default were legally made and the only question were whether the judge abused his discretion in refusing to set it aside, it may be that we could not reverse his ruling under all the circumstances—which need not be enumerated. But in our opinion that order was not legal and should have been set aside as matter of law, for the statute (C.L., Secs. 1710-1723, particularly Secs. 1710, 1712, 1720), as we construe it, permits a garnishee to appear personally and make his disclosure under oath at the trial or at any time before the trial between the plaintiff and defendant and does not require a written answer from

him or permit an order of default against him before such trial. The first amendment to the motion to set aside the order of default set forth the illegality of that order as one of the grounds for vacating it and an exception was taken to the denial of the motion.

The judgment that was finally entered against the garnishee can be supported, if at all, only as a judgment upon a default, which it purports to be, although it contains also a recital that a verdict had been rendered against the garnishee, which recital, though false, may be regarded as surplusage and as not in itself vitiating the judgment. Although the garnishee might have attempted to treat the preliminary order of default as void collaterally by attempting to come in at the trial and make its disclosure in spite of that order, or might have asked for leave to come in and disclose at the same time that it asked to have that order set aside, still it was justified in observing that order until it should be set aside and it had a legal right, by applying in time to have that order set aside, to be placed in a position to take any further steps that it might deem proper for protecting itself after the order should be set aside, without asking to be allowed to take such steps before the order should be set aside. The contention that the final judgment was justified on the theory that the garnishee was in fact in default by not appearing and offering to disclose at the trial notwithstanding the previous order of default cannot be sustained. That was practically an order of the court that the garnishee could not appear and disclose at the trial or at any time and a proper course for the garnishee to take was to first ask to have that order vacated. It should not under the circumstances be made to suffer because of the error committed by the court at the instance of the plaintiff in making the order of default and in refusing to set it aside.

It is unnecessary to touch upon other points that were argued.

The decision overruling the motion to set aside the order of default and the judgment against the garnishee are reversed, the order of default set aside, and the case is remanded to the

Circuit Court for such further proceedings as may be proper and consistent with this opinion.

Smith & Lewis and *L. J. Warren* for plaintiff in error.

W. A. Whiting and *C. F. Clemons* for defendant in error.

HENRY SMITH *v.* HAMAKUA MILL COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 9, 1904.

DECIDED MAY 27, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Declarations against interest by an alleged adverse possessor of land are admissible to show the nature of the possession.

It is of the essence of adverse possession that it should be hostile and that the circumstances of the holding be such as to give the true owner notice, at least if he paid attention to his rights, that the possession is under claim as owner; and if the possessor so conducts himself towards the true owner as to lead him to believe that the possession is in subordination to his title, the elements of hostility and openness are lacking and the possession is not adverse.

The evidence in this case held sufficient to support a finding that the alleged adverse possession was not hostile for a portion of the necessary statutory period or the conclusion that such possession was not shown to be hostile for such portion of the period to the satisfaction of the jury.

Under C.L., §2113, kindred of the half blood of the intestate who are not of the blood of the ancestor are excluded from the inheritance, not only as against the kindred of the whole blood in the same degree who are of the blood of the ancestor but also as against the remoter kindred who are of such blood.

Kailakanoa, a konohiki whose name appears in the Mahele Book of 1848, died intestate in 1856 without having obtained an award for the land and without having alienated her right or estate, if any,

therein. Huakini, her sole heir, died in 1860, intestate and, similarly, without any attempt at alienation. In 1862, the Minister of the Interior issued, under the Act of 1860 for the relief of kono-hikis, an award for the land in the name of Kailakanoa. Held, that the award inured to the benefit of the heirs of Kailakanoa, that is, of those who would have inherited the land from her if the award had been issued in her lifetime; and that, in ascertaining who such heirs were, a half brother of Huakini not of the blood of Kailakanoa must, under the proviso of section 2113, be excluded in favor of the remote kindred of Huakini who were of the blood of Kailakanoa.

OPINION OF THE COURT BY PERRY, J.

For past history of this case, see 13 Haw. 245, *Ib.* 716, and 14 Haw. 669. The case is now here on defendant's exceptions taken at the third trial.

At the close of the evidence the defendant moved that the jury be directed to render a verdict in its, the defendant's, favor, upon the ground, among others, "that upon the undisputed and uncontradicted facts shown by all the evidence in said cause, the defendant's defense of the statute of limitations was and is fully sustained, both in fact and in law," and after verdict moved, on the same ground, for judgment *non obstante veredicto*. Both motions were denied and exceptions allowed to the rulings. Whether or not an exception was noted to the verdict before the discharge of the jury, is disputed. It may be assumed, in view of the conclusion reached by us on the merits, that such an exception was duly noted or that, if it was not, the question of the sufficiency of the evidence to support the verdict on the issue of adverse possession is presented by the other exceptions just referred to.

At the trial the plaintiff adduced evidence tending to show, as it is claimed, that the paper title to an undivided one-fourth of the land of Koholalele, Hamakua, Hawaii, was in the plaintiff. The defendant then introduced evidence tending to show that since the date of the decree of January 1, 1871, by Chief Justice Allen, the defendant and its predecessors in interest have had possession of the whole ahupuaa adversely to the plaintiff

and those under whom he claims and since 1874, in which year Huakini's widow, Hoomana, conveyed her one-half interest to Paul Nahaolelua, adversely to all, the facts thus shown being substantially the same as those proven at the second trial, a statement of which is to be found in 14 Haw. 671, 672, 673. In rebuttal, two witnesses Mrs. Kia Nahaolelua and D. Kahaulelio, testified for the plaintiff. As at the second trial, undisputed evidence required a finding that the defendant and its predecessors in interest had, for a period of more than twenty years next preceding the commencement of this action (service of summons was made November 26, 1897), possession that was actual and continuous; and as at that trial it seems to be conceded that since December 2, 1878, the date of the deed from Kia Nahaolelua to Widemann, that possession had all the elements of an adverse holding. The plaintiff's contention now, as then, is that there was evidence sufficient to support a finding that as against Kapuhe and the grandchildren of Kapau (plaintiff's predecessors in interest) the possession of the Nahaoleluas was not hostile, open, notorious or exclusive, and that these two men so acted towards the parties just named as to lead them to believe that the possession was on their behalf and not under claim of absolute ownership. In our opinion, the present contention is well founded.

Kahaulelio testified, in part, as follows:

"Q. Do you remember the time that Kia Nahaolelua sold this land, this Koholalele?

A. After the death of P. Nahaolelua, in September, 1875, and somewhere in '76 or '77, Kia Nahaolelua disposed of this land of Koholalele.

Q. Did you have anything to do with that transfer?

A. Before the land was disposed of, Kia Nahaolelua came to me, acting as their attorney, to make out papers for the transfer.

Q. Please relate the conversation between yourself and Kia Nahaolelua?

A. After the death of Nahaolelua and when it was ascertained about a certain heir, then Kia Nahaolelua came to me and wanted to have this land disposed of. So I advised him that I thought it was not proper for him to sell the land now,

inasmuch as there were heirs to the property,—well, blood relations to the property. And for the reason if he sold, why it would raise a disturbance, and for that purpose I advised him not to do it but rather to sell, if any to sell what you call the interest of the old man, P. Nahaolelua; so after that we parted and sometime afterwards I heard that the land was disposed of.

Q. What did he say when you told him—spoke to him in this way,—when you said there were other blood relatives?

A. He said that, 'Never mind' or 'Never mind about that.' He says 'Let me sell it and they can fight for themselves.' And I told him that I couldn't do that.

Q. How did you come to say that there were other blood relatives who had an interest in this land?

A. While I was his private secretary I used to have charge of sums of money. One was the Koholalele money, another was church funds, another was government funds, and moneys belonging to the chiefs, for their lands on Maui. Somewheres in '69, '70 or '71 I asked him in reference to the Koholalele funds and he told me that he was partly interested in that money but there were also some blood relatives that were interested in that money also, and during '72, '3 and in fact at the election of the King, King Kalakaua, what you call—there was a supposition that P. Nahaolelua would be taken away from Lahaina; that is, he would cease to be governor to be brought down here, and then we had further talk on the subject of this money and still he told me that there were other blood relatives that were interested in it.

Q. But he didn't say who their names were?

A. Yes, he didn't say who their names were.

Q. Did you know Kapehe, a relative of Nahaolelua? Did you know Kapehe?

A. I saw Kapehe during—about that time, '70 or '71 or between that, in Lahaina.

Q. Living where?

A. Lived with the governor sometimes, P. Nahaolelua, and sometimes with another gentleman up there by the name of Kawehi.

A. I told him at the time not to have anything to do with the sale of it, and also advised him that there were others making claims to the land and who were heirs also, and if he should make any sale whatever it would lead him into trouble, pilikia.

Q. But he paid no attention?

A. Paid no attention to it.

Q. How long ago was this conversation that he has just been relating?

A. The conversation between Kia was after the death of Nahaolelua, '76, '77, somewheres around there, but the conversation—

Q. About '76?

A. About '76, somewheres around there, but the conversation with Nahaolelua, P. Nahaolelua, was somewheres about '69 or '70, somewheres around there."

Mrs. Kia Nahaolelua gave the following testimony:

"Q. Mrs. Nahaolelua, are you the widow of Kia Nahaolelua, the son of P. Nahaolelua?

A. Yes, sir.

Q. Or the adopted son of P. Nahaolelua. I will show you—show the witness Exhibit 'C', deed from——'6', deed from Kia Nahaolelua and wife to H. A. Widemann, and ask the witness if that is your signature to that deed?

A. Yes, that is my handwriting.

Q. And you acknowledged that deed before Judge Fornander?

A. Yes.

Q. Why was there that long delay between the time your husband signed and the time you acknowledged that deed?

A. Because I didn't want to sell the land.

Q. Then please state what was said between Kia and yourself?

A. He wanted to sell the land but I wouldn't agree to it, but he says 'we better sell the land and get the money, because there are heirs that will come in by and by'; he says, 'and if we don't sell it now we will have to fight with the heirs.' So I says, 'Well, I don't agree to that. I will wait a little while and I see; if I make up my mind I will sign the deed.'

Q. What word did he use for heirs? Did he talk Hawaiian or English to you?

A. He talked Hawaiian, some times in English.

Q. What was the word 'heirs' in Hawaiian?

A. Pili koko.

Q. And you finally signed?

A. After a long time, then I signed it.

Q. Did you ever know Kapehe?

A. Yes.

Q. Where did Kapehe live?

A. In Honolulu.

Q. Where in Honolulu?

A. In the palace.

Q. Do you know how she came to live in the palace?

A. I think the old governor put her there.

Q. What old governor?

A. Nahaolelua.

Q. What makes you think so?

A. Because I heard them—I heard him say that.

Q. You heard him say that?

A. Yes. Well, he and his wife together. The old gentleman and his wife.

Q. Did you ever see Kapehe in Honolulu?

A. Yes, sir.

Q. Where?

A. In Queen Emma's yard.

Q. When?

A. When the governor comes down to Honolulu.

Q. By 'Governor' you mean Nahaolelua?

A. Nahaolelua. And we often stayed there with Queen Emma's mother.

Q. Did you ever see any transaction between Nahaolelua and Kapehe?

A. I know before he goes to Lahaina he—he gives her money.

Q. Did you see it yourself at any time?

A. Only that time I was there; at that time when the Governor was there.

Q. You saw that with your own eyes?

A. I saw it with my own eyes, but I don't know what is the money for.

Q. Did you ever see any transaction between Kia and Kapehe?

A. After the Governor's death.

Q. About what year was that, that you saw——?

A. It is '70, '76 I think, and we go back and forward from Lahaina to Honolulu. I think it must be in '76 or right after Nahaolelua's death in '75.

Q. What did you see then?

A. What did I see then?

Q. Yes, at that time.

A. I saw my husband give Kapehe some money.

Q. How much—what kind of money was it, do you remember?

A. I think it is in silver, silver money.

Q. How much; do you know how much?

A. I think it is about twenty-five dollars.

Q. Did you hear any of the conversation between the two?

A. No.

Q. Did you ever have any conversation with Kia about Kapehe?

A. Yes.

Q. What was that conversation?

A. About the money. I asked him what made him give her the money.

Q. Where was this? When was that?

A. That was here.

Q. I mean when your talk—when you had your talk with Kia, when was that?

A. Well, long after that; long after he gave the money.

Q. What was the occasion of your talk with him about it?

A. Well, he spoke about selling the land.

Q. Yes.

A. And I asked him what he want to sell the land for, and he says, 'Well——

Q. In that conversation that you had before, what else, was there, if anything, said?

A. Well, he said he gave the money to her to give her—keep her quiet.

Q. And when was this conversation?

A. Well, I couldn't exactly say when, but it was along—It is about two months, I think, after that.

Q. Two months after that?

A. I think so. After he gave the money to her.

Q. Well now, going on to the time that you have mentioned, the talk with your husband Kia Nahaolelua about the \$25 to keep Kapehe quiet, do you think on looking back, do you think that that talk was before Kia had sold the land or after he sold it to Mr. Widemann? Which should you say?

A. Before the land was sold.

Q. And everything that you have referred to was before the sale?

A. Before the sale.

Q. Well, was it after Kia had signed but before you signed?

There was some considerable time, you know, between. What do you think about that?

A. I think it was long before I signed.

Q. Before you signed?

A. I think it was long before that.

Q. You think it was after Kia had signed?

A. I think the deed was made in seventy—1878 or '77, I don't know which. Yes, it was before the sale, I remember that.

Q. You have testified here, I believe, that upon one occasion you saw old Governor Nahaolelua giving Kapehe some money but you don't know what it was for?

A. I didn't know what it was for.

Q. Did you see what the money was; how much it was or anything of that sort?

A. Well, he put his hand in his pocket and gave it to her, but I don't know how much he had in his hand. I saw him give her the money with my own eyes, but I don't know how much money he had.

Q. Isn't this true: that any Hawaiian that was with Nahaolelua who was in need of money, if he had it in his pocket he would give it to her; wasn't that the old Governor? Wouldn't he do that way?

A. Yes, but he had a habit of giving this old lady always.

Q. Well, a good many others too?

A. And others too, and others too.

Q. That was the old Hawaiian fashion?

A. Yes, that is the old Hawaiian fashion."

Where testimony or the statements of parties as testified to by witnesses are reasonably capable of more than one construction, the jury alone is to determine the meaning intended to be conveyed by the witness or the party as well as the credibility of the witness and the inference to be drawn from facts proved where more than one inference may be so drawn reasonably. Some of Kahaulelio's testimony concerning the rents of Koho-lalele while capable of the construction that Kia Nahaolelua made the statements testified to is also capable of the construction that it was Paul Nahaolelua who made such statements. So also as to Kia's declaration to his wife that the object of the payment of money by him to Kapehe was to "keep her quiet".

From that the jury might have found that all that Kia meant was that Kapehe might set up or had set up an unfounded claim to the land which he, Kia, did not recognize and that the gift of money had been made simply for the purpose of keeping her in a friendly state of mind and render her unwilling to seriously assert her claim and without any intention on his part of recognizing her claim or of leading her to believe that he did recognize it in any way. On the other hand the declaration, taken in connection with Mrs. Nahaolelua's testimony concerning the time and the circumstances under which it was made, was also capable of the construction that Kia believed that Kapehe had a valid claim and feared that she might assert it and therefore gave her the money so as to lead her to believe and leading her to believe that it was a portion of the rent of the land and in that way misled her into thinking that he was not holding adversely to her. Similarly, it was for the jury to say, upon the evidence, who it was that Paul and Kia referred to when they spoke of the "blood relatives." Bearing in mind, then, the rule above stated as to the province of the jury in the matter, there was evidence which could legally have justified the jury in finding that both Paul and Kia Nahaolelua were aware of the fact that Kapehe had an interest in the land and by their acts and words led her to believe, as late as 1876, that their possession was not hostile to her but with recognition of her interest or, in view of the fact that the law placed upon the defendant the burden of proving every essential element of adverse possession, in concluding that upon all the evidence the element of hostility during that period was not proven to their satisfaction. It is, of course of the essence of adverse possession that it should be hostile and that the circumstances of the holding be such as to give the true owner notice, at least if he paid attention to his rights, that the possession is under claim as owner; and if the possessor so conducts himself towards the true owner as to lead him to believe that the possession is in subordination to his title, the elements of hostility and openness are lacking and the possession is not adverse. These findings could have been made even in spite

of the showing contained in the probate records of 1871 as to the presence of Kapehe on the witness stand in those proceedings and of the inference which was held, when the case was last before us, to be deducible therefrom that Kapehe was then aware of the extent of P. Nahaolelua's claim. That inference was rebuttable, as was clearly recognized in the former opinion in the statement that "*in the absence of any satisfactory showing to the contrary*, the only reasonable inference is that she knew that Nahaolelua was claiming to be heir to one half and that he recognized Hoomana only as the other heir." It is unnecessary to reconsider now the correctness of the ruling that under the circumstances stated that was the *only* reasonable inference. It is scarcely necessary to add that the question is not whether, if the trial were being held before us, we would find the evidence of Kahaulelio and of Mrs. Nahaolelua sufficient to rebut the *prima facie* showing of adverse possession made by the defendant or would, in view of such rebuttal testimony, conclude that the burden as to the elements of hostility and openness had not been successfully borne by the defendant, but merely whether reasonable men could reasonably, by legitimate inference from the facts proved, make such finding or thus fail to be satisfied as to the existence of those elements. There was, of course, evidence even by Kahaulelio and Mrs. Nahaolelua that would have supported a finding that the possession was in all respects adverse for the full statutory period.

Since, then, the evidence would support a finding of lack of hostility as late as 1876, there is nothing in the evidence to require a finding that the nature of the possession changed prior to December 2, 1878, the date of the deed from Kia Nahaolelua to Widemann. Possession once shown to have been at its inception permissive or in subordination to the true owner's title, is presumed, in the absence of any showing to the contrary, to continue of the same character,—in other words, the burden is on the possessor to show that it thereafter became hostile. This action was commenced less than twenty years from the date last mentioned. Upon the issue of adverse possession we think that the

verdict cannot be disturbed. It may be remarked that Kahaulelio did not testify at any former trial and that the portion of the testimony of Mrs. Nahaolelua here discussed and relied upon was not given at the second trial.

The contention that the testimony concerning the statements by Paul and Kia Nahaolelua and the payments by them to Kapehe was inadmissible, cannot be sustained. Evidence of such acts and declarations by an alleged adverse holder, made against interest, are admissible to show the true nature of the possession.

Under certain of the exceptions it is further contended on behalf of the defendant that the paper title itself is in the defendant and that for this additional reason a verdict should have been directed for the defendant. The argument in support of this is two-fold: first, that Section 2113, C.L., excludes the kindred of the half blood not of the blood of the ancestor only as against those of the whole blood in the same degree and that, therefore, even if this was an ancestral estate coming to Huakini by descent from Kailakanoa, P. Nahaolelua inherited one half to the exclusion of the remoter kindred of Huakini (that Hoomana's one half is now in the defendant is not disputed in this case); second, that this inheritance did not come to Huakini by descent from Kailakanoa for the reason that the award was not issued until after Kailakanoa's death and that she did not have title to the land at her death.

C.L., §2113, reads as follows: "The kindred of the half blood shall inherit equally with those of the whole blood in the same degree; provided, however, that where the inheritance came to the intestate by descent, devise, or gift, of some one of his ancestors, all those who are not of the blood of such ancestor, shall be excluded from such inheritance." In a former opinion in this case we said, on this point: "Nahaolelua, then, could not inherit, for, although as a rule kindred of the half blood inherit equally with those of the whole blood under our statute, yet they are excluded when they are not of the blood of the ancestor through whom the inheritance came to the intestate by descent,

devise or gift.”—13 Haw. 716, 717, 718. This is contended by the defendant to be *obiter dictum* and by the plaintiff to be the “law of the case” and not open to reconsideration at this time. It may be assumed for present purposes that the remarks just quoted were mere *dicta* and that the matter is now open for reconsideration.

The view expressed at the former hearing was reached only after careful consideration. With the benefit of the argument now presented for the defendant and of a re-examination of the subject, we are still of the opinion that that view is correct and that it was the intention of the legislature as expressed in §2113 to exclude all those of the half blood not of the blood of the ancestor not only as against those of the whole blood in the same degree but also as against those of the whole blood in a remoter degree. So far as the precise point under consideration is concerned, this seems to be the natural construction and the only construction possible without in effect adding the words “as against those of the whole blood in the same degree.” The fear that the construction preferring the remoter kindred of the whole blood will lead to the exclusion of the widow, seems to us to be unfounded. The section was intended to make explicit provision as to the circumstances under which the half blood would or would not inherit and does not affect the rights, declared in other sections, of the widow who in any event is not of the blood of the intestate. The section first states the general rule that the half blood shall inherit *equally* with the whole blood, not more nor less nor under different circumstances, thus leaving the widow, if she would otherwise inherit, always provided for; and then adds that in the case of ancestral estates certain of the half blood shall not inherit at all. The language of the proviso is clear and does not permit of the limitation that it shall apply only as against those of the whole blood in the same degree.

Courts elsewhere are divided as to the construction to be given to similar statutes. Those of California, Michigan and, perhaps, Indiana support the view urged for the defendant; those

of Arkansas, Missouri, North Carolina, Alabama by *dictum*, and perhaps Wisconsin, the opposite view. On whichever side the preponderance of authority may be,—in this connection it must be remembered that the various statutes differ in their language to a greater or less degree—the better reasoning seems to us to lead to the construction adopted by us. It follows that, if this was an ancestral estate, P. Nahaolelua did not inherit from Huakini.

As to the second branch of the argument. Kailakanoa died in 1856 and Huakini in 1860. Neither obtained an award for the land. The award was issued on January 15, 1862, by the Minister of the Interior under the authority conferred by the Act of 1860 for the “Relief of certain konohikis, whose names appear in the Division of Lands from Kamehameha III”, Kailakanoa being a konohiki whose name appears in the Mahele Book of 1848. The award so issued was in the name of Kailakanoa, as also was the Royal Patent for the same land issued on July 19, 1862.

The act just referred to authorized the Minister “to grant awards for their lands to all konohikis who have failed to receive the same from the Land Commission, provided that the names of such konohikis appear in the Mahele Book of the year 1848”, and declared that all awards so granted should be “equally valid with those of the Land Commission”. It also required the Minister to publish notice “calling upon all konohikis, their heirs, executors and administrators, to present their claims on or before” a day named. We think that the act shows upon its face that it was the intention of the Legislature that the awards authorized should be issued not only in cases where the konohiki was alive but also in those where the konohiki was dead and that in the latter class of cases the awards should be in the name of the original claimant. Such, as we understand it, had been the practice of the Land Commission under similar circumstances and the same practice was prescribed, in the matter of the issuance of patents upon awards of the Land Commission, by the act of July 29, 1872, which provided: “Every Royal

Patent hereafter issued upon an award of the Board of Commissioners to Quiet Land Titles, shall be in the name of the person to whom the original award was made, even though such person be deceased or the title to the real estate thereby granted have been alienated."

It is contended, however, that an award to a deceased person is void. This award was issued, in form, as the law directed that it should be. It may be that, in substance, it can be sustained on the theory or fiction that it was intended to relate back to Kailakanoa's lifetime and that the title should be regarded as coming by descent from her to her heirs, or on the view that a konohiki whose name was in the Mahele Book of 1848 had, from the time of the entry in that Book until the issuance of an award, a right to or estate in the land which was descendible and which after the death of the claimant was confirmed and completed in the heirs by the issuance of the award. However that may be, we are of the opinion that it was the intention of the legislature, sufficiently expressed in the statute, that the benefit of the award should inure, in the case of a deceased konohiki who had not alienated his right or claim, to his heirs,—to those who would have taken as his heirs if the konohiki had received the award in his lifetime. The act of 1872, already referred to, expressly directed that all royal patents thereafter issued should "inure to the benefit of the heirs and assigns of the holder of such original award." This is not quoted as statutory authority for the view here adopted as to awards but merely to show that that view, one which, as we understand, has in practice been for a long period of years recognized, is the one adopted by the legislature in 1872 in the somewhat related matter of royal patents. In short, the position taken by the Land Commission and by the legislature in the acts of 1860 and 1872 was that it was not for the government or its authorized representatives to consider or to determine who were the alienees or the heirs of deceased konohikis, but that it would simply issue the awards or patents in the name of the original claimants and leave it to those claiming under the latter to determine subsequently, whether

with or without the aid of the courts, their respective rights as though acquired by descent or by deed from the awardee.

If this was what the legislature intended, there can be no difficulty in ascertaining, in the case at bar, who the persons were to whose benefit the award issued in Kailakanoa's name inured. If Kailakanoa had received the award in her lifetime, the title would, upon the undisputed evidence, have passed by descent to Huakini, her half brother, as her sole heir and from him by descent, one half to Hoomana, his widow, one fourth to Kapehe the second, daughter of Keaka, sister of Kapehe the first, the mother of Kailakanoa and Huakini and the remainder to other kindred of Huakini of the blood of Kailakanoa, to the exclusion of P. Nahaolelua who, while he was the half brother of Huakini, was not of the blood of Kailakanoa. Had the complete title vested in Kailakanoa by the issuance of the award to her in her lifetime, the proviso of §2113 would without doubt have applied and must likewise, in the view here expressed concerning the intention of the legislature, be applied in determining who the persons were to whose benefit the award inured.

Whether or not the subject last discussed is open to consideration upon the present bill of exceptions, need not be determined. We have assumed, in defendant's favor, that it is properly before us.

The exceptions are overruled.

Kinney, McClanahan & Cooper and *S. H. Derby* for plaintiff.
A. S. Hartwell and *Cecil Brown* for defendant.

In re THE QUEEN'S HOSPITAL.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED MAY 23, 1904.

DECIDED MAY 27, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Money may lawfully be appropriated by the legislature for the benefit of the Queen's Hospital, an institution conducted for the relief of indigent sick without distinction as to nationality, creed or otherwise.

OPINION OF THE COURT BY PERRY, J.

On the motion to dismiss this appeal, we held that the appropriations involved, if they are rightful subjects of legislation, could be lawfully passed at an extra session of the legislature called under the provisions of Section 54 of the Organic Act. *Ante*, p. 514. The only question remaining is whether or not the appropriations were rightful subjects of legislation.

The money appropriated, payment of which is sought by this appeal to be enforced, was collected by taxation and can be expended for public purposes only,—it may not lawfully be used for purposes of private interest. What is a public purpose within the meaning of this rule, it is not always easy to determine. No general definition, to apply in all cases, need be laid down. It is sufficient to determine in each particular case whether, upon all the facts and circumstances, the purpose is a public one. "In deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they (the courts) must be governed mainly by

the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."—*Loan Association v. Topeka*, 87 U. S. 655, 665.

In this jurisdiction and elsewhere, to provide and care for the indigent sick has long been recognized as a proper and, perhaps, necessary function of government. This provision and care is sometimes furnished in hospitals owned and conducted by the government itself; but if the government does not own or maintain such an institution, the relief may with equal propriety be furnished indirectly through a hospital conducted by individuals for public purposes and not for private gain, by assisting, to a reasonable degree, in the maintenance of such institution. As was said in *Hennepin v. Brotherhood*, 27 Minn. 460, 462, "Without undertaking to give a general definition, it will be sufficient for all the purposes of this case to say that an institution established, maintained and operated for the purpose of taking care of the sick, without any profit, or view to profit, but at a loss which has to be made up by benevolent contribution, is a charity. If, in addition to this, the institution is one the benefits of which the public generally are entitled to enjoy, it is then a purely public charity—public, because, although not owned by the public, its uses and objects are public; purely public, because its uses and objects are wholly public, and for the benefit of the public generally, and in no sense private as being limited to particular individuals." To such an institution aid may be extended by the government, because of the function which it is performing.

The Queen's Hospital received its charter in 1859, whereby it was constituted a body corporate, with power, among other

things, to "provide for and proceed with the erection, furnishing, establishing and putting into operation, a permanent hospital at Honolulu, with a dispensary, and all necessary furniture and appliances for the reception, accommodation and treatment of indigent sick and disabled Hawaiians, as well as such foreigners and others who may choose to avail themselves of the same." The original incorporators and their successors were declared by the charter to be a board of trustees "with power to make and enact by-laws for the government, control and direction of the said corporation and its hospital" and property. The charter also provided: "In case at any time hereafter, the said corporation shall have any surplus money or property, above all its requirements and necessities for the purpose of said Queen's Hospital, contemplated by this Charter, all such surplus shall be used, applied and expended in and for the erection and establishment of other hospitals or dispensaries, on some or one of the Hawaiian Islands, for the same objects and purposes as the hospital to be established under this charter, and for no other object or purpose whatever." Referring first to the last quoted provision, the corporation does not exist for gain. Its profits, if any, can be devoted only to the extension of its own field of usefulness or for the other charitable purposes named; no part of such profits can inure to the benefit of any private individual, whether a member of the corporation or not. Further, the assistance and relief contemplated is to be extended to all indigent sick and disabled alike, without distinction as to nationality, creed, or otherwise. The language of the charter admits of no other construction, in this respect.

If, then, the purposes of the Hospital are to be ascertained from the charter alone, there can be no doubt that it is a public charity and, consequently, that public aid may be extended to it. It is contended, however, that the charter is in conflict with the provisions of the statute under which it is said to have been granted,—the act of April 20, 1859. Sec. 1 of that act provides that "It shall be competent for the Minister of the Inte-

rior, under the regulations prescribed by the general law in regard to corporations, to grant a perpetual charter to any of the inhabitants of the city of Honolulu applying for the same, being subjects or denizens of the kingdom, and to their successors, for the establishment of a hospital in said city, or the vicinity thereof, for the relief of sick and destitute Hawaiians", and Sec. 7 that "Such corporation may, as soon as the same may be done, without interfering with the primary object of said institution, as hereinbefore expressed, contract to receive and provide for sick and disabled seamen of other countries, or patients of any description who are fit subjects for hospital treatment." Whether the word "Hawaiians" in Sec. 1 was intended to mean aborigines or citizens of Hawaii, need not be considered. It may be assumed that the former was intended. Still, we think that there is nothing in the act to prohibit the hospital established thereunder from giving relief to the sick and destitute of other nationalities, provided, at least, it can do so without interfering with its so-called "primary object"; and under the general law of April 17, 1856, relating to corporations the Minister of the Interior had authority to grant a charter of incorporation to an institution created for the purpose of giving such relief without discrimination. As the pleadings and evidence show, the Queen's Hospital has, ever since its establishment, extended its aid to all indigent sick alike and that, so far as appears, without interfering with its "primary object". It is still treating all alike. As long, at least, as the principle of equality is thus observed, public moneys may rightfully be appropriated for its aid. The effect, upon the right of the Hospital to receive moneys so appropriated, of the exercise of the power, if it exists, to confine its relief to Hawaiians, need not be considered until and unless the contingency arises. The moneys involved in the appropriations and warrants now in question are, we think, for a public purpose.

That patients able to pay are charged certain sums varying in accordance with their ability or with the conveniences furnished, does not of itself render the institution any the less a public

charity. The moneys so obtained are devoted to the same charitable purposes. Charity should be bestowed only where it is needed. There is no discrimination as between the pay patients themselves. All are treated alike who fall within the same class. So also the fact that the trustees determine the patients' financial ability does not deprive the Hospital of its eleemosynary or public character. If the trustees abuse their trust, they are subject to the supervision of a court of equity. On these two points see *Downer v. Hospital*, 101 Mich. 555, 560; *Hennepin v. Brotherhood*, *supra*; *School v. Louisville*, 36 S. W. (Ky.) 921, 922; *McDonald v. Hospital*, 120 Mass. 432, 435.

An order will be made, if necessary, directing the auditor to issue the warrants demanded.

Robertson & Wilder for the Queen's Hospital.

Deputy Attorney General E. C. Peters for the Auditor.

ORIGINAL.

In re KAWAHARA YASUTARO, FUKUSHIMA KINASAKU and KUBIYAMA HIROKICHI.

SUBMITTED MAY 16, 1904.

DECIDED JUNE 1, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

Witnesses confined in jail by virtue of an order of arrest made by a circuit judge, prior to the trial in the circuit court, under authority of Section 1367, C.L., are entitled to be discharged after the trial on the indictment and cannot be restrained under such order pending the hearing of the defendant's exceptions in this Court.

OPINION OF THE COURT BY GALBRAITH, J.

Habeas corpus in behalf of Kawahara Yasutaro, Fukushima Kinasaku and Kubiyama Hirokichi who are alleged to be un-

lawfully restrained of their liberty, being confined in jail at Lihue, by J. H. Coney, Sheriff of the Island of Kauai, Territory of Hawaii.

The application for the writ was addressed to the Chief Justice and was issued returnable before the Court.

The return of the sheriff seeks to justify the imprisonment: (1) under authority of "an order of arrest" made by the circuit judge of the Fifth Circuit, in the case of the Territory of Hawaii v. Moritaro Matsumoto, charged with the crime of murder in the first degree. This order after reciting that the sheriff had filed an affidavit with the Court setting out that these parties were material witnesses in said case, proceeds, "You are hereby commanded to arrest the said Kawahara Yasutaro, Fukushima Kinasaku and Kubiyama Hirokichi forthwith and detain them in your custody until further order of this Court, unless they shall each enter into good and sufficient undertakings with one or more sureties in the sum of five hundred dollars each to be and appear and testify from time to time as ordered or directed herein fail not. Dated Lihue, Kauai, February 9th, 1904." and signed by the Judge; (2) that at the March Term, 1904, of the Fifth Circuit Court the defendant in the case of the Territory of Hawaii v. Moritaro Matsumoto, was convicted of the crime of murder in the first degree and that his attorney moved for a new trial which motion was then and there overruled and that said attorney "is preparing a bill of exceptions to the Supreme Court of the Territory of Hawaii to correct errors alleged to have occurred and been committed during the progress of the trial of said cause"; (3) that none of the witnesses in whose behalf the application is made has applied to the Circuit Judge for release; (4) that the said Kawahara Yasutaro, Fukushima Kinasaku and Kubiyama Hirokichi, unless held and restrained under and by virtue of the order aforesaid, will remove from the Territory of Hawaii, and be lost to the Territory as witnesses in said cause should the same, by reason of any alleged errors, be remanded to the trial Court for a new trial."

The sole issue presented by the return is, does the order of

arrest made by the circuit judge prior to the trial on the indictment authorize the sheriff to restrain these witnesses pending the hearing of the defendant's exceptions on appeal? We are clearly of the opinion that it affords no such authority.

The statute under which this order was made reads: "The Attorney General or the Sheriff on the several circuits may require of any judge of a court of record, at Chambers, that witnesses material to the prosecution of any criminal indictment preferred, or about to be preferred, be bound by recognizance to appear and testify at the trial of such indictment, or that such witnesses be committed to jail for that purpose, and it shall be lawful for the Judge, so applied to, to make such order." Sec. 1367, C.L.

This statute authorized the judge upon the application of the Sheriff to make an order directing the sheriff to take the recognizances of the witnesses "to appear and testify at the trial of such indictment" or "to commit them to jail for that purpose" but did not authorize him to direct the sheriff to commit the witnesses to prison for an indefinite period or "until the further order of the court." However, the statute being the limit of the judge's power in the premises the order of arrest cannot be held to intend to empower the sheriff to do more than the statute authorized. In other words the order could do no more than empower the sheriff to take the recognizances of the witnesses to appear and testify on the trial of the indictment against the defendant or to commit them to jail for that purpose. *The People v. Milles*, 5 Barb. 511, 514, 515.

It is said by the Supreme Court of Iowa: "The power to require persons, without accusation of wrong or without a hearing, to give even their own pledge for their appearance as witnesses, is surely an extraordinary power, and still more extraordinary when security may be required and imprisonment imposed for a failure to give it. The power to bind witnesses by recognizance to appear and give evidence has long since been conferred upon courts and judges by the statutes of many, if not all, of the States. We are not aware that it has ever been exercised in the

absence of statutory authority. It is a familiar rule that when the statute confers authority upon any given subject it is to the exclusion of all other authority than that expressed in the statute." *Comfont v. Kittle*, 81 Iowa, 179, 181, 182.

Again this statute being penal in its effect must be construed strictly and in favor of the liberty of the citizen. Its scope can not be extended by implication. Only the power clearly given by its language can be exercised under it. *In re Brito*, 7 Haw. 42; *Ex parte Shaw*, 61 Cal. 58; *The State v. Grace*, 18 Minn. 398; *Clayborn v. Tompkins*, 141 Ind. 19.

As the statute only authorized the judge to direct the sheriff to take the recognizances of the witnesses to appear and testify at the trial, or to commit them to jail "for that purpose" and the trial has taken place, the power, and all the power, conferred by this statute has been exercised and the order cannot be any justification for holding the witnesses further, no matter what the language of the order may be.

In answer to the contention that these witnesses, unless restrained, will be "lost to the Territory", at a retrial of the case in which they are material witnesses, providing the defendant perfects his bill of exceptions and providing further that the same should be sustained by the Supreme Court and a new trial ordered, we will say that we are not impressed with this position. There is of course a possibility of a retrial of the cause but no certainty of it. There is no authority in the statute for a sentence of indefinite imprisonment against these witnesses. The presumption is in favor of the regularity of the proceedings of courts of record and the burden is placed on one alleging errors therein to show it affirmatively. We cannot indulge in the presumption that the defendant's bill of exceptions, if prepared and allowed, will result in a reversal of the judgment of the circuit court and a retrial of the defendant; even if such a presumption were allowable the statute does not authorize the imprisonment of these witnesses pending the hearing on the exceptions.

The witnesses were entitled to their discharge after the trial

on the indictment in the circuit court and since that time they have been unlawfully restrained. They were not compelled to apply to the circuit judge for release. They had a perfect right to apply to this court, as they did so, for their discharge.

Let the witnesses be restored to liberty.

S. K. Kaeo for the writ.

E. C. Peters, Deputy Attorney General, for Sheriff.

In re CLINTON J. HUTCHINS, Trustee.

ORIGINAL.

SUBMITTED MAY 21, 1904.

DECIDED JUNE 1, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

C.L., Sec. 1688, which in terms requires the defendant to file a bond for rent to accrue in order that he may retain possession pending appeal from a judgment against him in a summary proceeding for possession, is repealed by implication by L., 1892, Ch. 57, as amended by L. 1903, Act 32.

This court may on certiorari issue a writ of restitution but does not do so at present in this case because no notice of the issuance of the writ of certiorari was given to the plaintiff below and no motion for a writ of restitution was made or notice thereof given to the plaintiff below.

OPINION OF THE COURT BY FREAR, C.J.

The case is stated in the opinion denying the motion to quash the writ of certiorari. *Ante* p. 624. It is now presented on its merits on the record.

The respondent contends that the petitioner was not entitled to retain possession pending the appeal because the bond filed was insufficient to meet the requirements of C.L., Sec. 1688. That section was repealed by implication by the judiciary act of 1892, as amended in 1903. This follows from the reasoning in the opinion just referred to, though it was not so stated expressly in that opinion. Therefore it was not necessary to file any bond under that section.

It is next contended that the petitioner waived his rights by

reason of having asked the Magistrate to overrule his motion to vacate the writ of possession. The petitioner contends that he asked merely for a pro forma ruling in order that the matter might be taken to a higher court, and that the Magistrate apparently did not understand him. The Magistrate's record shows that the motion to vacate was made April 1, that the Magistrate postponed his decision until April 9, that the petitioner orally requested him to overrule the motion on April 4 pending the delay in giving his decision, that the Magistrate declined to do this, and that on April 9 he overruled the motion on his own judgment and irrespective of the petitioner's supposed request to overrule. It is clear, from the entire record and the petitioner's conduct as shown by the record, that he did not intend to waive his rights and that the Magistrate did not act on a supposed waiver.

The record supports the allegations of the petition that the writ of possession was issued pending the defendant's appeal in the summary proceedings and without giving him an opportunity to be heard or to file a supersedeas bond. It follows, as we practically held on the motion to quash the petition, that the action of the Magistrate in this respect must be set aside.

The petitioner suggests that a writ of restitution be issued to restore him to the possession of which he was deprived by the illegal issuance and execution of the writ of possession. In our opinion this court may issue a writ of restitution in a proper case on certiorari. This view is supported by C.L., Secs. 1163, 1165, 1632, as well as by decisions elsewhere, although there are decisions to the contrary in the absence of statutes or under different statutes. And if notice of these certiorari proceedings had been served on the plaintiff below, we might be in a position to issue such a writ, if necessary, under the prayer for "other relief" or as an incident to the setting aside of the proceedings before the Magistrate. But no such notice was given and no motion has been made for a writ of restitution or notice thereof given to the plaintiff below. The usual practice is to make such a motion and serve notice thereof on the party who would be

affected by the issuance of such a writ. In the absence of such notice we shall not issue such a writ—whether such notice is an absolute prerequisite in every case or not. It is perhaps the better practice also to serve notice of the issuance of the writ of certiorari on the opposite party below, even though the sole object is to have the proceedings below vacated and no request is made for a writ of restitution, but the statute does not in terms require that and the court acts on the record itself and not on the rights claimed by the opposite party under the void proceedings. See *Siedler v. Chosen Freeholders of Hudson*, 39 N. J. L. 632, 638.

Since the hearing the Magistrate has moved that the record of the subsequent proceedings on the appeal in the Circuit Court be added to his return for the purpose of showing that this court in the exercise of its discretion ought not to issue a writ of restitution. This motion is denied because, among other reasons, the Magistrate is not interested in the question of restitution.

The Magistrate's allowance of the motion for a writ of possession, his issuance of such writ, and his refusal to allow the motion to set aside the same are avoided and set aside, with leave to the petitioner to move for a writ of restitution in this court.

Cathcart & Milverton for petitioner.

Kinney, McClanahan & Cooper for respondent.

HAWAIIAN COMMERCIAL & SUGAR COMPANY *v.*
WAILUKU SUGAR COMPANY.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 23, 1903.

DECIDED JUNE 2, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ,

The surplus water of an ahupuaa, meaning thereby the water, whether storm water or not, that is not covered by prescriptive or riparian rights, is the property of the konohiki, to do with as he pleases, and is not appurtenant to any particular portion of the ahupuaa.

No part of such surplus water passes as an appurtenance under a deed of a portion of the ahupuaa not bordering on any stream nor having any streams or springs within it.

By the judgment in the case of *Lonoaea et al. v. Wailuku Sugar Company et alt.*, 9 Haw. 651, 665, 666, all of the prescriptive rights to water then owned by the respondent were adjudicated and awarded to it.

By the term "its present estate", used in that judgment, was meant only the 984 acres of respondent's land then in cane or which had been theretofore planted in cane, and not all of the available cane land then owned by the respondent.

By that judgment the respondent was not awarded all the water in the

Wailuku stream during the day irrespective of the quantity in the stream.

That judgment excluded night water and Sunday day water as not belonging to the respondent by prescription.

With reference to water which had been used adversely for less than the statutory period, the institution of proceedings and the judgment in the *Lonoaea* case interrupted the running of the statute, and the period of prescription would have to commence anew thereafter. The adverse user had before the judgment cannot be tacked on to that, if any, had after that time so as to ripen into title.

The judgment in the *Lonoaea* case awarded to the respondent "the water for its present estate from these auwais" (meaning the various large auwais then leading from the Wailuku river) "on each day of the week, excepting Sunday, from 4 o'clock a. m. to 4 o'clock p. m., the dams to be kept substantially as they are at present, composed of loose stones and dirt." "The water for its present estate" thus awarded means the water needed, without waste, for the 984 acres, constituting the respondent's estate at the time of the institution of that suit, if cultivated in cane, limited, however, to the quantity flowing in the auwais as they were at that time and diverted by the dams kept substantially, as to height, composition and otherwise, as they then were, and limited further to the days and to the hours named in the judgment. This may include the water of freshets, small or large, provided it is thus needed and only to the extent that it is thus needed and always with the limitations mentioned as to time of taking and capacity, etc., of dams and ditches.

It does not necessarily follow from the mere fact of a discontinuance of irrigation of land to which water rights are appurtenant, that the right to the water is abandoned. Whether or not there has been such abandonment is a question of intent, to be determined upon all the evidence.

Under the judgment above quoted, the respondent was awarded water for the purposes of its sugar mill.

The water flowing from a tunnel dug by the respondent on its estate since the date of the *Lonoaea* judgment is now owned by the respondent in addition to the water to which it is entitled under that judgment.

Water may be diverted from lands entitled thereto to other lands, provided such diversion can be accomplished and to the extent only that it can be accomplished without injury to the rights of others.

Where an attempt is made to so divert water, the burden is upon the party making such attempt to prove that the diversion is without injury to the rights of others; and if the proof is not such as to satisfy the court of the harmlessness of such diversion, the diversion will be enjoined.

The rights of the Wailuku Sugar Company in the waters of the Wailuku stream declared and an injunction ordered to issue restraining it from continuing certain illegal diversions of water shown to have been committed by it.

OPINION OF THE COURT BY PERRY, J.

The bill is for an injunction to restrain alleged illegal diversions of water from the Wailuku Stream, Maui. Upon a plea in bar, interposed by the respondent, this court on appeal has decided to what extent the judgment in *Lonoaea et al. v. Wailuku S. Co. et alt.*, 9 Haw. 651, which judgment is binding upon the present parties, has determined the several matters now in controversy, 14 Haw. 50.

After the ruling upon the plea, the circuit judge, with the consent of the parties, appointed a commissioner and directed him to take evidence and to make findings upon certain stated issues and to report to the court the evidence so taken and the findings so made. The commissioner, after an examination of the *locus in quo* and the taking of evidence, a transcript of which covers 892 typewritten pages, presented a lengthy report. The circuit judge thereafter dismissed the bill, not stating, however, the reasoning upon which his conclusion was based, and neither affirming nor setting aside, expressly, any of the findings of the commissioner.

To the descriptions of the *locus in quo* with its dams and ditches, old and new, contained in the decision in the *Lonoaea* case and in that upon the plea in bar, 14 Haw. 50, may be added the general description of the Ahupuaa of Wailuku given by the commissioner (Report, p. 4), reading as follows: "The Ahupuaa of Wailuku contains as near as may be estimated, an area

of 28000 acres, which may be divided into three principal sections:

“First. An upper great valley (Iao) oval in shape, having a length of about 4 miles and greatest width of about 2 miles, and an area of about 4600 acres. The valley is almost entirely surrounded by high mountain walls, attaining at highest point an elevation of 5788 feet above sea level. The Wailuku River has its source in this valley and emerges therefrom through a long narrow gorge to the lands below.

“Second. A lower section which includes the Wailuku Commons (Spreckelsville, etc.) and the lands below the Wailuku Sand Hills having an area of about 19500 acres.

“Third. A central section which includes the river bed and flat bottom lands adjacent, (constituting a lower shallow valley), from the gorge of the upper valley to the sea; including also the easy slopes between the foot of the mountains and the sand hills and extending to Waiehu on the North and to Waikapu on the South. It includes also a considerable mountain portion lying outside of the upper valley.

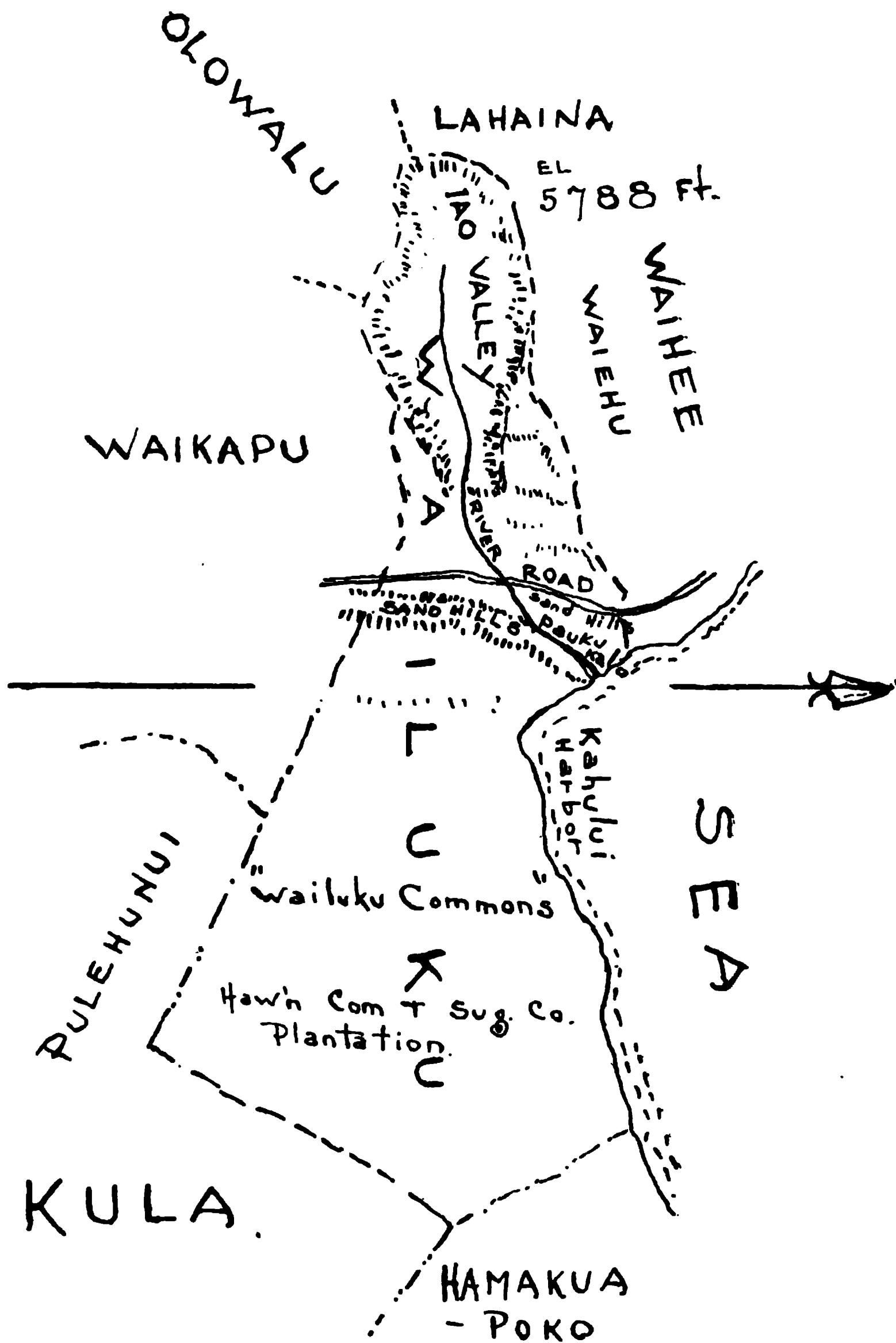
“Within this central section are all of the cultivated lands of the Wailuku Sugar Co. and practically all of the taro lands of Wailuku.

“Estimate of the ownership of lands in the Ahupuaa of Wailuku, shows:

“Owned by Hawn. Com. & Sugar Co.	24541.73	Acres
“Owned by Wailuku	3080.73	“
“Owned by other parties	377.54	“

“Total28000.00 Acres”

A copy of the commissioner’s map, showing these three main subdivisions, here follows:



The waters in controversy may be divided into three classes: (1) those of the ordinary flow of the Wailuku stream; (2) those of ordinary (small) freshets, which come about once in ten days; and (3) storm waters (large freshets). These again may be divided into two classes: (a) surplus water, meaning thereby, as defined in 14 Haw. 61, the water, whether storm water or not, that is not covered by prescriptive rights and excluding also riparian rights, if there are any, and (b) water which is covered by prescriptive rights. The water flowing from a tunnel dug by defendant on its own land in 1901 and said to be sufficient to water 65 acres of cane, is not included in any of these divisions because it is not in controversy. It is undisputed and clear that such tunnel water is the property of the defendant and may be used by it as it sees fit. We shall first treat of the rights of the parties in the waters of the stream and then consider whether or not the respondent has exceeded its rights to the injury of the complainant.

Surplus water. This, in our opinion, is the property of the konohiki, to do with as he pleases, and is not appurtenant to any particular portion of the ahupuaa. By ancient Hawaiian custom this was so. Originally the King was the sole owner of the water as he was of the rest of the land and could do with either or both as he pleased. In later years, the rule seems to have been for him not to dispossess tenants of their lands except for cause and to that extent, perhaps, he would not have deprived cultivators of the water to which their lands were by usage entitled. But no limitation, so far as we can learn, ever existed or was supposed to exist to his power to use the surplus waters as he saw fit. There is no reason for supposing that such water was regarded as appurtenant to one portion of the arable land of an ahupuaa and not to another portion or for supposing that it was appurtenant to the arable land and not to the remainder of the ahupuaa. During recent years konohikis have in many instances diverted from the ahupuaa the surplus water either wholly or in large part. An argument based upon public policy or upon the necessity or wisdom of encouraging the cultivation

of the soil upon a scale unknown and impossible in ancient times, cannot be of assistance, for a determination that the surplus water belongs, in accordance with ancient Hawaiian custom, to the konohiki is not less in favor of an enlarged measure of cultivation than would be a determination that such water belongs to the present holder of a particular portion of the ahupuaa.

This was the view entertained by Chief Justice Allen thirty-seven years ago and expressed by him relative to this very ahupuaa in the suit of *Peck v. Bailey* (8 Haw. 658, 661, 662, 663, 671), the parties in which were the predecessors in interest of the present respondent. "There can be no difference of opinion," said that judge, "that the complainants were entitled to all the water rights which the lands had by prescription at the date of their title. By the deed, the water courses were conveyed and a right to the water accustomed to flow in them. The same principle applies to all the lands conveyed by the King, or awarded by the Land Commission. If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance. An easement appurtenant to land will pass by a grant of the land, without mention being made of the easement or the appurtenances. But if lands had no such rights, and no additional grant of water rights was made, it certainly could take nothing by having been a portion of the Ahupuaa. * * * * *

"The complainants contend that they have the right of lord paramount to the Wailuku river. The grantor of a large portion of the complainants' land had the same right as his ancestor, who was the konohiki of this Ahupuaa, subject to the rights of tenants, which were afterwards confirmed by the Land Commission. These rights were certain taro patches and the water necessary for their cultivation. This was a limitation to the entire control of the river.

"The grantor of complainants has conveyed portions of this Ahupuaa to several persons. Each grantee will hold all that has been conveyed to him, unless it should conflict with a previous conveyance. This includes the water courses on their lands, and all the water which the lands had enjoyed from time immemorial. The deeds to defendants were from the same source

originally and conveyed similar rights and privileges as appurtenant. So it appears by the deeds to the complainants and defendant, that a large part of the Ahupuaa has been conveyed to them by the konohiki, with all the rights and privileges appertaining. By the evidence it appears that there are large valuable water rights appurtenant to these lands. It is very evident, therefore, that the complainants cannot be lords paramount over the Wailuku river, but they have certain valuable rights of water as an appurtenance to the land conveyed to them, and nothing more. They cannot claim ~~any~~ rights except what they have acquired by their deeds and leases, and the defendant is in the same category. Both are limited in their rights of water, and there is not the slightest ground for declaring either as lord paramount; as much reason, as a matter of principle, in the one case as the other. The difference consists merely in the far greater possessions of the complainants. * * * *

"The water courses on this Ahupuaa have existed from time immemorial, and were doubtless made by the order of ~~some~~ ancient King, and when the late King conveyed these lands to the proprietors, the rights of the water courses, in this full enjoyment, was included as an appurtenance. While the King owned this Ahupuaa, he had a right to apply the water to what land he pleased, but after the water courses were made, more especially after being in use from time immemorial, his conveyance of the land would include them, the same as his conveyance of the land bordering on the Wailuku river will include the rights of water in said river, which had not been before granted."

In this case the respondent or its predecessors in interest acquired by deed from Kamehameha IV, dated April 21, 1863, prior to the deeds and patent under which the complainant holds, 1375.52 acres of the kula land of the ahupuaa, not bordering on the stream nor having any springs or streams in it. The respondent claims that under this deed it acquired as an appurtenance of the land surplus waters of the ahupuaa. Just what part of such surplus is claimed is not entirely clear, although in theory it seems to be as much thereof as is necessary and available for the proper irrigation in cane of the land so purchased. This, in effect, judging from the figures and detailed arguments urged, would seem to be all or practically all of such surplus. The respondent does explicitly contend that none of such surplus.

can be used by the konohiki on the lower section of the ahupuaa with its 19500 acres composed in very large part of arable land, and that all is appurtenant to the central section. Whatever respondent's precise claim on this point may be, in our opinion no part of the surplus water, as such, of the ahupuaa passed under the deed in question.

Water covered by prescriptive rights. As to this, the judgment in the *Lonoaea* case is a complete adjudication. As already decided on the plea in bar, the rights in the surplus water were not adjudicated. In our opinion, *all* of the respondent's prescriptive rights were adjudicated, including in the term prescriptive as here used the rights appurtenant to taro land. The right of taro lands to water has generally, if not always, been regarded and referred to by our courts as well as by parties as a prescriptive right acquired against the konohiki in the manner in which such rights can be acquired. In the decision on the plea in bar the term was so used.

The oft-quoted judgment in the *Lonoaea* case is as follows: "that the plaintiffs excepting those whose rights are specially considered herein above are entitled to such amounts of water as they have acquired by prescription for their various lands during the night from 4 o'clock p. m. to 4 o'clock a. m. of each day from the various large auwais leading from the Wailuku river; that the defendant corporation, the Wailuku plantation, is entitled to the water for its present estate from these auwais on each day of the week, excepting Sunday, from 4 o'clock a. m. to 4 o'clock p. m., the dams to be kept substantially as they are at present, composed of loose stones and dirt; the defendant corporation to carry out this order." Just what prescriptive rights were considered and included in this award can, perhaps, be best ascertained by stating first what rights the respondent in the present case relies upon in justification of its acts. In addition to the tunnel water and the water (surplus) the right to which was not acquired or claimed to be acquired by prescription, the respondent's claim is that it is entitled to (1) the water rights of 488.929 acres of ancient taro land owned in fee and leased

by it; (2) water rights acquired by prescription in favor of all or the greater part of 574.89 acres of kula lands, situate below the old ditches; (3) the prescriptive rights, confirmed by the *Lonoaea* judgment, to water "its present estate", 984 acres, in cane; (4) the right to 2-5 of the water of Kama auwai, secured by the judgment in the Bailey-Wilfong suit, under its purchase in 1877 of the lands to which such 2-5 was awarded; (5) the right to water at night 100 acres of taro lands purchased within 20 years next preceding the institution of the *Lonoaea* suit and in favor of which the right to use water *by day* is now claimed not to have accrued, a right to water by night being claimed. It is apparent that these rights claimed overlap to a greater or less extent.

The rights appertaining to the taro lands held by the respondent in 1894 whether in fee or under lease, were included in the award made as contributing to the right to water "its present estate." The same is true of the right claimed to have been acquired by prescription to water 574.89 acres of kula land and of 2-5 of the water of Kama auwai, in addition to the right to water "its present estate." The former judgment limited the water awarded for "its present estate" at a time when the defendant had 984 acres of cane land in cane and ploughed for cane, as testified to by its manager, and none in taro, and necessarily limited in another way the area of land which the respondent had a right to irrigate by declaring that the right was to take water "from these auwais" (meaning those then in existence) and thereby excluding all land above the Kalani and Kama auwais except in so far as water might lawfully be taken to it in exchange for lands below upon which irrigation might be discontinued. The court by its judgment, further, very clearly disallowed any claim on the respondent's part to water 100 acres or any other area of taro or cane land *at night*, for it awarded to the plaintiffs the right to water every night of the week, not excluding Sunday as it did with the respondent, thus indicating an intent to confine the respondent in its use of the water (prescriptive) not only to the daytime but also to six out of the seven

days of the week. This disallowance to the complainants and to the respondent respectively of any rights in the time of its opponents was urgently asked for by the respondent in that case as an examination of its brief will show.

Those various claims were in fact all considered in the *Lono-aea* case. The commissioner in that case said in his decision that "the defendant claims title by prescription to all the waters of the river in the daytime, say from 4 a. m. to 4 p. m., and therefore the right to use the water between those hours to suit its own requirements and convenience." So far as day use was concerned this claim was as broad as respondent could well make it, for if it obtained *all* the water in the stream it could not expect to get more from that source. The respondent admits in its brief in this case that in the former case it sought "in a half-hearted way" to tack the water rights acquired between 1873 and 1893 to its right to use water during the day. The attempt was evidently successful. It is true that Associate Justice Frear said in his opinion, "Further, the company has the right to water at night for many pieces of kalo land which it has acquired in recent years and which are not cultivated in cane", but Mr. Justice Frear dissented, in part, from the majority and in making that finding and ruling he was stating one of the points whereon he differed from them. Notwithstanding this express statement by the dissenting justice, the majority chose not to refer to the point in its reasoning and so framed its judgment as to disallow to the respondent prescriptive night water for those or any of its taro lands, thus adopting the respondent's view that, for the sake of a peaceful and more effective enforcement of the rights of each, the complainants should be confined to a use of the water at night and the respondent to a use of the water by day.

The claim for the water rights of the respondent's ancient taro lands was presented, 404.80 acres being the total then claimed in fee simple and 75 to 100 acres under lease—a larger area than was in fact then owned or leased by it as shown by the evidence in the present case. The same is true of the prescriptive rights in favor of "large areas of land, to-wit, most all of the

crown sales in the valley which have been in cane for over twenty years and may be presumed to have acquired water rights"; and of the right acquired through the Bailey-Wilfong decision to 2-5 of the water of Kama auwai, an award as to which counsel at that time conceded that "there can be but little doubt but that this was an inordinate proportion of the auwai."

Whether the evidence then presented and the law would have justified a judgment for more prescriptive water in respondent's favor, is a question not now open to consideration, although it might be added that the court may have been of the view that if it measured the allowance to the respondent by the total of its various detailed claims in favor of the specific parcels of land named it might be awarding to it more than the Wailuku stream carried and hence made use of another method of limiting and describing the extent of the respondent's rights. Where water has been transferred to kula land from ancient taro lands, the proprietor, after the use on the kula lands has continued for the statutory period, is too likely to be led to indulge in the view that the kula has acquired a prescriptive right to the water and that the taro lands have at the same time retained their ancient right and not lost it by abandonment. That, of course, is a mistaken view. Water rights cannot be doubled in that way. In the *Lo-noaea* case the court, in making its estimate of the total of respondent's rights, doubtless sought to avoid committing that mistake.

It is further contended for the respondent that by "its present estate" the court meant not only the 984 acres then in cane or which had been theretofore planted in cane but also all other available cane land then owned by the respondent. This cannot be sustained. In the first place, as already pointed out, the limitation of the right to take "from these auwais" necessarily excludes the view that any land above Kalani and Kama could be regarded as a part of that estate. Secondly, an important point in the controversy was whether respondent was using more water than it was entitled to and in its defense the respondent made great efforts to justify the watering of every portion of the

area which was then watered. Several methods were suggested for justifying the watering, for instance, of the 120 acres of new kula land from the Kalani flume, each involving and being based upon the discontinuance of the use on some other land of an equivalent quantity of water. Both the majority and the minority of the court likewise very carefully went into the question of how such new use could be justified. Why all this, if respondent's "present estate" was to include all land then owned by it? If respondent's present view of what the court intended to award were correct, all that would have been necessary to ascertain on that point of the 120 acres would have been the fact of ownership of that cane land. Moreover, this point has been expressly passed upon in the decision on the plea in bar. "The words 'for its present estate' must have some meaning. They must limit the amount of water to that theretofore used or at least to that needed on such estate. In either case if the defendant wished to irrigate by day additional lands that had no water rights it could do so only by using thereon water that might otherwise be used or needed on the old estate. It could not, so far as that decision is concerned, use additional day water even though there were an abundance of it."—14 Haw. 62.

The respondent's contention that it was awarded all the water in the stream during the day, in support of which it is argued, among other things, that the court said in its opinion in the *Lonoaea* case, 9 Haw. 665, that "Having sustained the claim of the defendant corporation to the use of this water during the day, it is of no importance whether the main auwais (Kalani and Kama) have been enlarged," has been already definitely disposed of. "It thus appears that the defendant was adjudged to be entitled during certain periods to 'the water *for its present estate* from these auwais.' This does not mean that it was entitled for use on its then estate to all the water in these auwais, much less to all the water in the stream. It means that it was entitled, during certain hours from these auwais, to the water for its then estate, that is, that it was entitled to take from these auwais during these hours all the water that its then estate had by pre-

scriptive right. * * * The decision could not in the nature of things have had reference to all the water, not only because the auwais in question were not large enough to carry all the water in times of plenty, but also because the rights adjudged,—whatever they were, were adjudged solely with reference to adverse user, and therefore they could not have extended beyond the user—which did not include all the water in times of plenty.

* * * We may add also that the controversy arose in a time of drought and that this fact was prominently before the court and that the rights in question were spoken of with reference to dry and ordinary times as distinguished from times of plenty. The prescriptive day right might cover all the water in the stream in dry times, but that would be, not because it covered all the water however much there might be, but because it covered a certain amount and there was not more than that amount in such times. * * *

“Nor does it follow as a matter of law as a necessary inference as distinguished from the actually intended decision, that all the water in the stream including surplus water was adjudged to belong to the defendant during the day, because the majority of the court based its decision on the ground that the exercise of the defendant’s right by day could not diminish the plaintiffs’ supply by night. If all rights, prescriptive and other, had been involved, that conclusion could be supported only on the premise that all the defendant’s rights were day rights and all the plaintiff’s rights were night rights; but since prescriptive rights only were involved, the conclusion as to such rights only would follow from the premise that the defendant’s prescriptive rights only were all day rights and the plaintiffs’ prescriptive rights only were all night rights. And, as indicated above, the same would be true as to a portion only of the prescriptive rights, provided the remainder were not interfered with, and such was the opinion of the majority of the court for certain exceptions as to the day right were expressly held in favor of certain other parties.”
—14 Haw. 61, 62, 63.

The words “from these auwais”, like the words “from the

various large auwais leading from the Wailuku river" and the words "the dams to be kept substantially as they are at present, composed of loose stones and dirt," cannot be regarded as words of mere comment, as urged by the respondent, or as idle words used for no purpose, but were inserted by the court in the statement of its conclusion or formal order for the express object of aiding in a definite statement of what the rights of the parties were. Respondent's counsel seems to be under the impression that we have held that the "various large auwais" includes only the Kalani and Kama and the Mill Ditch. We are not aware that it has been so held and are of the opinion that by the *large* auwais the court meant *all* the auwais leading from the river as distinguished from the lesser distributing ditches tributary to them. Any use of the water from the new auwais can be legally made only if it does not violate the requirement of the well established rule that such diversion shall be without injury to the rights of others.

To surplus water, as above defined, the respondent has not acquired any title by grant. The claim is made, however, that the respondent has by adverse use acquired the right to Sunday water, night water other than that needed by the holders of the taro lands and day water other than that needed and used on the respondent's former estate. We do not understand that in the *Lonoaea* case the court in framing its judgment declared a part only of the prescriptive rights which the defendant had theretofore acquired or that it intended to leave the respondent at liberty to claim thereafter that it had other or greater prescriptive rights not subsequently acquired. It declared *all* of such prescriptive rights and defined and measured their sum total by the wording of its judgment. In that judgment it expressly excluded Sunday water and night water as not belonging to the respondent by prescription, although respondent at the time claimed both by prescription, the Sunday water from 4 a. m. to 10 a. m. to offset the quantity taken by day by Wailuku residents for domestic purposes and for the remainder of the day, apparently, under the head of surplus water. From the

institution of the Lonoaea suit until this proceeding was brought, less than ten years elapsed and it was impossible for the respondent to have acquired during that period any new rights by prescription. Nor can any adverse user had before the *Lonoaea* judgment be tacked on to that, if any, had after that time so as to ripen into title. The former proceedings and the judgment interrupted the running of the statute and the period of prescription would have to commence anew. The weight of reason and some of the more recent authorities are in support of this view.

Another question is as to just how much is included in the award to the respondent of "the water for its present estate". Does this mean the water then *used* on or that *needed* for its estate and is it confined to the ordinary flow of the stream or does it include any freshet water? It means the water needed, without waste, for the 984 acres, constituting the respondent's estate in 1894, if cultivated in cane, limited, however, to the quantity flowing in the auwais as they were at that time and diverted by the dams kept substantially, as to height, composition and otherwise, as they then were, and limited further to the days and to the hours named in the judgment. In times of ordinary flow or of scarcity, all of the water may be taken by the respondent if all is needed for the purpose stated; and the water of the freshets, small or large, may also be taken if they are thus needed and only to the extent that they are thus needed and always with the limitations already mentioned relating to hours and to capacity, position and nature of dams and auwais. More than this the respondent is not entitled to. The remainder, subject to other prescriptive rights, belongs to the kono-hiki, the complainant.

Much has been said by the respondents concerning the ancient right of taro lands to a portion of the storm or freshet waters for the purpose of flushing out the patches and thus aiding in a healthy growth of the taro. The equivalent of this is practically recognized in the judgment, as here interpreted, in its allowance of freshet waters or a portion thereof for the cane if

needed. That ancient flushing right was itself, necessarily, subject to the same, if not greater limitations concerning the capacity, etc., of dams and ditches.

Some minor points will now be referred to. The complainant contends that the water rights of certain ancient taro lands owned by the respondent have been abandoned and have reverted by operation of law to the konohiki. The commissioner found "that about 53 acres of original taro land has been abandoned for cultivation and irrigation under conditions suggesting that such abandonment is permanent", but declined to "pass on the ultimate intention of the defendant as to these lands." Whether or not the rights have been abandoned, is a question of intent. It does not necessarily follow from the discontinuance of irrigation of land to which water rights are appurtenant that the right to the water is abandoned. It may be and often is the fact that the discontinuance is merely for the purpose of using the water on other lands. If there is any one thing in this case that is entirely clear, it is that the respondent has never voluntarily surrendered any water rights. Upon the whole evidence we find that there has been no abandonment of the rights appurtenant to the 53 acres under consideration.

Respondent at the date of the *Lonoaea* judgment held 19.84 acres of taro land under lease from the complainants. That lease has now expired and it is contended for the complainant that the water rights of that land should not be regarded in this proceeding as belonging to the respondent. But the lease was still in force at the date of the bringing of this suit and it is the rights as of that date that we are considering. The contention, therefore, cannot be supported, although the area involved, with its water rights, could not be regarded as contributing to the respondent's water rights after the date of the expiration of the lease.

The complainant claims that the tunnel water developed and owned by the respondent, in so far as it is used at the mill, cannot be held to justify an increase of acreage by the respondent. The quantity of water so developed must be regarded as a net

gain over the quantity to which respondent was entitled under the *Lonoaea* judgment, because at the date of that judgment the respondent was using from the stream water for the same mill purposes and the judgment should, we think, be construed as awarding to the respondent the right to continue to take from the stream for those purposes.

The commissioner's report, as we understand it, shows that since 1894 the respondent has purchased 91.686 acres of taro lands and has sold about 3.654 acres of taro lands without reserving the appurtenant water rights, a net gain, apparently, of 91.032 acres of purchased taro lands; that at the date of the *Lonoaea* judgment it had under lease 72.45 acres of such lands; and that when this suit was instituted the total of such leased lands was 33.147 acres, a net loss of 39.31 acres of leased taro land with water rights. The report does not, however, state in summarized form how much, if any, of the land so purchased was held under lease by the respondent in 1894, how much, if any, of the land so sold was held by the respondent in fee or under lease in 1894, how much, if any, of the lands now under lease were under lease to the respondent in 1894, or how much, if any, of the land covered by the leases the terms of which have terminated in any way since 1894 was under lease to the respondent in 1894. It may be that the report contains sufficient data from which to obtain these results, but at best it is in complicated form. We prefer not to make findings on these points, as counsel have not been heard with particular reference thereto. Moreover, the parties may be able to agree as to the figures without the aid of the court. Nor do we decide now as to whether the rights appurtenant to the lands acquired or to those lost by the respondent since 1894 by deed or lease or termination of lease continue of the same character, concerning the time of taking, after as before the acquisition or loss. The point is one that has not been fully argued and, perhaps, not all the parties necessary to a complete adjudication on the subject are before the court. Further, there are intimations in the briefs that by common agreement or by acquiescence night rights

acquired by the respondent are treated as days rights and days rights lost by respondent are treated as night rights.

Has the respondent exceeded its rights since the former judgment? Hereunder, first, of the diversion at Maniania. The Maniania dam is situate at a point about one mile mauka from the head of Kalani auwai, about $1\frac{1}{3}$ miles above the head of Kama auwai and still further, of course, from the head of the mill and other lower ditches. The commissioner found that under the bed of the stream from a point some distance above the Maniania dam to the sea is a stratum estimated at from 25 to 40 feet in thickness composed of loose boulders, sand and gravel, resting upon a lower stratum of material practically impervious to water. This gravel bed is urged by the complainant as constituting a subterranean reservoir from which at certain points water issues into the stream augmenting the supply of the latter. This theory rests largely upon expert testimony. Other expert testimony is to the effect that while such gravel bed exists the water from it passes underground to the sea and does not reappear at any point in the river bed. This latter theory is supported by the fact, clearly established, that in the absence of the ordinary surface flow no water in the nature of seepage or other springs has ever been known to appear in the bed of the stream. Upon the evidence, the respondent's theory as to the method of the discharge of the waters from the gravel bed is the correct one. And yet the undisputed existence of the gravel bed is of some importance in the determination of whether or not injury follows from the diversion at Maniania. The saturation of a portion of the gravel bed made necessary by the reduced level of the stream delays a certain portion of the diverted water when returned into the stream at Maniania. In consequence of this, of the distance between Maniania and the lower auwais and of other causes, the returned water necessarily requires time for its passage from the higher to the lower dams and through the lower auwais, the length of time so required varying, in accordance with the volume of the flow and its consequent rapidity, from forty minutes to an hour or more. The

respondent may avoid the injury which would result from such difference of time and yet divert some water, by exchange, to the new lands under that ditch, as, for instance, by returning the water into the stream at Maniania not at 4 p. m. but at an hour as much earlier as may be necessary so that, beyond doubt, the water will be at 4 p. m. in all its accustomed volume where it would be at such time but for such diversion at Maniania. If there is any difficulty in determining precisely the hour at which the water must be returned from Maniania in order to comply with this requirement, the respondent must overcome it by returning it at such an early hour that there can be no doubt of the fact of compliance, for the burden is upon it, if it desires a diversion to new lands, to make it without injury to others and to prove that it has been made if at all without such injury.

The respondent suggests that the loss to the taro lands due to its failure to return the water at Maniania before 4 p. m. is fully compensated by its failure to use its share of the night water appurtenant to the taro lands acquired by it since 1894. Assuming that such last named right has not been availed of by the respondent (the respondent's own evidence shows that it has been) the suggestion is one more properly for consideration by the parties by way of contract and can have no effect upon the *rights* as they exist.

It is urged by respondent by way of partial justification for what might otherwise appear to be transgressions on its part, that while it is entitled to take the water at 4 a. m. each day, its irrigators do not commence work until 6 a. m. and that the taro lands have the benefit of the difference. This claim is not substantiated by the evidence. While the irrigators are not at work before 6 o'clock, the tenders of the main ditches are at four and the water during those two hours is run into reservoirs for later use. However that may be, the respondent can easily run such water into reservoirs and in that way preserve the benefit of the judgment which it so vigorously sought in the

former case. Any change to a use beginning at 6 a. m. can be obtained now by contract only.

Another injury caused to the konohiki by the past method of diversion lies in the fact that freshet water has been diverted at Maniania at the same time that it has been diverted in the three main (old) auwais. It needs no argument to show that four ditches may carry more freshet water than three and the evidence indicates that the respondent has taken more freshet water through the four ditches together than it is entitled to take.

Thus far Maniania diversions by day only have been referred to. In view of what has been stated above, night diversions by that ditch could at most be lawfully made only by way of exchange from the taro lands and rights acquired since 1894. Such diversions cannot be made without injury to other taro lands. All the taro lands take their water by night; their right is to use the water jointly on every night,—although, as the evidence shows, a different permissive use has to some extent prevailed among the owners for some time. To permit the respondent to take its share at Maniania would be to lessen the quantity and consequently the rapidity of the waters flowing in the old auwais from which the other taro lands take their supply and this would be an injury to them. The respondent has since 1894 diverted water at night at Maniania.

Through the old auwais, as well as through Maniania, the respondent has since 1894 diverted water on Sundays, from 4 a. m. to 4 p. m., for irrigation, “at such time or times as it deemed necessary and practically as on other days of the week except so far as there was difficulty in obtaining men to irrigate, and limited somewhat by claims of certain kuleana holders in Sunday day water. * * * Such Sunday irrigation has not been constant but has covered as many as half the Sundays of the year, and more if necessary. * * * Sunday water not needed for irrigation has been steadily used by the Wailuku Sugar Company to fill its reservoirs in Wailuku and Waikapu for later distribution. * * * Land irrigated by such Sunday water might be on an average 500 acres (young cane)”. The

commissioner so finds and his finding is amply supported by the evidence. All of such use on Sundays has been in excess of the respondent's rights. It will be noted by reference to what has been stated above that it has exceeded even the use claimed in the *Lonoaea* case.

As found by the commissioner, this finding also being supported by the evidence, the respondent has, since the former judgment, used, "the night water (from 4 p. m. to 4 a. m.) from the Maniania, Kalani and Kama auwais by running the same into one or more of its reservoirs in Wailuku and Waikapu under the following conditions: freely and at its own discretion in times of abundance of surplus water; in a limited way at other times under claim of a right to a portion thereof by virtue of certain taro lands owned, the amount so taken being dependent on the judgment of the plantation water overseers or lunas and on the alertness and vigor of other claimants in asserting their claims". In other words, the respondent has exceeded its night right, which consists merely of the right appurtenant to the taro lands or some of them purchased since 1894.

While it is impossible to ascertain from the evidence, partly because of the reservoir system and of the mingling of Wailuku and Waikapu waters in the ditches and reservoirs, just how much surplus water (as in the opinion defined) has been taken by day by the respondent, we are satisfied from the evidence that some surplus water has been so taken.

The diversion to Waikapu has not been specifically referred to because that issue is in the main disposed of by the above views as to Maniania ditch from which the greater part of the diversion to Waikapu has been made. What has been said as to diversions by Maniania for the watering of new Wailuku lands applies equally to similar diversions for the watering of Waikapu lands. In consequence of the mingling of Waikapu and Wailuku waters, the respondent has failed to show to our satisfaction that the diversions thus far made have been without injury to the rights of others. This inability to prove the harm-

lessness of any given diversion will probably continue as long as the present system of mixing waters continues.

The respondent has based a large part of its argument in justification of its various diversions of water, upon mathematical calculations intended to show that it has planted no greater areas than it has a right to plant. In part these calculations are upon the assumption that the respondent may lawfully use more than sufficient water for the total of 984 acres of "its present estate" under the *Lonoaea* decision in addition to the water to which it has acquired rights since that decision and to that extent, the assumption being found to be erroneous, are of no assistance. Some of the calculations given might indeed, at first impression, lead one to believe that the respondent has not since 1894 watered more land than it is entitled to water and that it has not exceeded its rights. A great weakness of the showing made by these figures lies in the fact that the area of land is not the only standard named in the former judgment for measuring the respondent's rights. The limitations as to auwais, dams, days and hours are none the less to be observed. Apparently contradictory results are reached from various calculations of areas of old and new lands planted and old lands lying fallow, capacity and flow of auwais and stream, the relative necessities of cane and taro, etc. How far these inconsistencies, real or apparent, result from inexact evidence it is, of course, impossible to say. To some extent they are doubtless the result of insufficient evidence, as, for example, on the subject of the quantity diverted to Waikapu and of the areas watered thereby, this whole subject being as yet in a conjectural state, and to some extent the result of the methods employed by the respondent, as, for example, in running in the same auwais and to the same reservoirs Waikapu and Wailuku waters, thus rendering well nigh impossible an exact measurement of past diversions. This method of dealing with the issues involved is at best an unsatisfactory one. It is unnecessary to resort to it, for no mathematical calculations can successfully overcome the other evidence concerning the diversions of Sunday, night and other surplus water

or the fact of the other injury above stated caused by the taking at Maniania. A number of the questions at issue between the parties concerning surplus water and the interpretation of the former judgment being now determined, and the respondent's present rights being now declared, and the fact found that since 1894 it has exceeded those rights in the respects, at least, already stated, it will be sufficient, without definitely determining whether it has in other respects also exceeded its rights, to issue an injunction restraining the respondent from continuing to commit any acts in excess of its rights, first stating in a preamble to the injunction what those rights are, as here ascertained and declared.

The respondent was, at the date of the institution of this suit entitled: (a) to the water, whether of the ordinary flow of the Wailuku stream or of freshet water, needed for the estate, in cane, of 984 acres which it had at the time of the *Lonoaea* judgment, (less deduction for day rights, if any, since lost as above suggested, the extent thereof to remain open to adjudication) such water to be taken from the Kalani and other lower auwais in existence at the date of said judgment on each day of the week, excepting Sunday, from 4 o'clock a. m. to 4 o'clock p. m., the dams to be kept substantially as they were at the date of said judgment, composed of loose stones and dirt,—this right of the respondent being subject, however, to the qualification mentioned in the *Lonoaea* decision in favor of E. H. Bailey and others and to the further possible qualification that taro lands held in 1894 and since lost with their water rights have, if it is hereafter so adjudicated, likewise a right to water by day; (b) to take (jointly with the holders of the taro lands) for its taro lands not held in 1894 and acquired by it since the date of said judgment, each day from 4 o'clock p. m. to 4 o'clock a. m. from said auwais, the dams to be kept as stated in (a), the water, whether of the ordinary flow of the Wailuku stream or of freshet water, needed for its said taro lands as such; (c) to the water, whether of the ordinary flow of the Wailuku stream or freshet water, needed for three acres more of taro lands (the right to

which water without the land the defendant has purchased since the date of said judgment), to be taken (jointly with the holders of other taro lands) each day from 4 o'clock p. m. to 4 o'clock a. m. from said auwais, the dams to be kept as stated in (a), provided the water here referred to can be diverted to lands other than said three acres without injury to the rights of others; (d) to divert through the Maniania ditch to new lands water to which it is entitled under (a) above and the use of which is discontinued and as long only as it is discontinued on old lands so under (a) entitled thereto, provided such diversion is accomplished and only to the extent to which it can be accomplished without causing any injury to the rights of others; (e) all of the foregoing rights to be subject to the rule which permits transfers when they may be made without injury to the rights of others. An injunction should be issued restraining the respondent (1) from diverting any water from the Wailuku stream on Sundays between 4 o'clock a. m. and 4 o'clock p. m., (2) from diverting any water from said stream on any day between 4 o'clock p. m. and 4 o'clock a. m., except as stated in (b) and (c) above, (3) from diverting through the Maniania ditch any water from said stream on any day between 4 o'clock p. m. and 4 o'clock a. m., (4) from diverting at any time through the Maniania ditch any water, whether of the ordinary flow or of freshets, without, during the whole of the time of such diversion, diminishing by an equivalent quantity the water which it may rightfully take through the lower auwais, (5) from diverting water through the Maniania ditch by day at such time as to prevent the entire water in the Wailuku stream from being at 4 o'clock p. m. where it would be but for such diversion at Maniania, and (6) from otherwise in any manner exceeding its rights as in this opinion declared. A decree will be made in accordance with these views, on application.

A. S. Hartwell, W. O. Smith and Castle & Withington for complainant.

Kinney, McClanahan & Cooper for respondent.

IN THE MATTER OF THE WILL OF CHARLES NOT-
LEY, Deceased.

MOTION FOR REHEARING.

SUBMITTED MAY 16, 1904.

DECIDED JUNE 3, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

A rehearing should not be granted merely in order that the entire case may be presented again as at the first hearing in the hope that the court may be induced to come to a different conclusion.

OPINION OF THE COURT BY FREAR, C.J.

(Galbraith, J., dissenting.)

The court having held, *ante*, p. 435, that the trial judge did not err in directing a verdict for the proponents of a will and codicils, on the ground that there was no evidence upon which the jury could properly find for the contestants on the issue of undue influence, the contestants now move for a rehearing upon the following grounds:

1. That the decision is in conflict with an express statute to which the attention of the court was not drawn and which was overlooked by the court. The statute relied on is C.L., Sec. 1355, which provides, among other things, that juries shall be exclusive judges of the facts and that the trial judge shall not comment on the evidence. This statute was called to the attention of the court in contestants' brief, it was not overlooked by the court, and the decision is not in conflict with it. It does not prevent the trial judge from directing a verdict when there are

no facts shown upon which the jury could properly base a verdict, and the provision as to commenting on the evidence, if it is constitutional (see *Capital Traction Co. v. Hof*, 174 U. S. 1), does not prohibit the direction of a verdict in a proper case.

2. That the decision is in conflict with controlling decisions of this court, to which the attention of the court was not particularly drawn and which were overlooked by the court. The decisions relied on are those which hold in substance that a case should not be withheld from the jury if there is any substantial evidence upon which a verdict could properly be based. Several of these cases were called to the attention of the court in the contestants' brief, they were not overlooked by the court, and the decision is not in conflict with them. The court could not have more clearly shown that it recognized the principle contended for than it did by its language, at page 438, in the decision. To hold that a case may properly be taken from the jury when there is no evidence is not in conflict with the view that a case should be left to the jury when there is evidence. Whether the court failed to apply the principle which it enunciated will be considered under the next point.

3. That points submitted and decisive were overlooked and that the decision was based on a point not raised by the bill of exceptions and not argued by counsel. The contention is that the court, although it announced the principle just referred to, did not apply it but on the contrary considered the case as depending upon whether the evidence for the contestants was clear and convincing and not upon the question raised by the exceptions and argued, that is, whether there was any evidence upon which a verdict could properly be based. The decision, as we construe it, does not bear out this contention. The argument seems to be based largely upon several passages that were inserted in the decision, chiefly for completeness of statement or to avoid mis-impressions, but which did not form the basis of the decision. The correctness of these passages is not questioned but the contention is that the decision was based upon them rather than upon the other main principles stated in the decision. For

instance, the main contention is that the court proceeded on the theory that in order to justify leaving a case of this kind to the jury the evidence of undue influence must be "clear and convincing", whereas the court merely stated that circumstantial evidence alone of undue influence should be of a clear and convincing character, which is not disputed by the contestants, and this statement was made as a natural and usual qualification to a rule stated, in accordance with contestants' contention, that undue influence may be shown by circumstantial evidence. The court did not say that such evidence should be clear and convincing to the court in order to be left to a jury, but on the contrary stated in substance that if there was any material evidence it should be left to the jury, and the court proceeded on that theory. It stated the law and the evidence at some length—perhaps at unnecessary length—largely because of the nature of the question and of the conclusion and the elaborateness of counsel's argument, but concluded that, although there was sufficient evidence to justify a jury in finding a number of contestants' contentions, there was not sufficient to justify a jury in finding that the final disposition of the decedent's property was the result of undue influence. See p. 456. There was no direct evidence of undue influence. Indirect evidence had to be resorted to. The court expressed the view that the evidence might have justified a jury in finding that the presence and conduct of the one charged with exercising undue influence produced a decided change for the worse in the decedent's family, that she and the decedent were fond of each other and even that she had the disposition and opportunity to try to influence him in the matter of his will. It then remained to show that she had the power, not only to influence, but to unduly influence him. In order to show that, it was necessary to show that she had a general control over him. But not only did the uncontradicted evidence show affirmatively that he was a man of strong mind but there was no evidence tending to show that she had a general control over him. On the contrary the evidence tended to show that when they were of different desires or opinions she was the

one to yield. It is immaterial how much evidence there was on other points provided there was no substantial evidence on one essential point. As stated in the decision mere influence or even bad influence is not undue influence within the meaning of the law of wills.

To grant a rehearing in this case would be to do so merely in order that the entire case might be presented again substantially as at the first hearing in the hope that the court might be induced to come to a different conclusion. That should not be done. *Harbottle v. Rawlins*, 11 Haw. 207, 209. Few, if any, cases have been presented to this court with greater thoroughness and earnestness than this case, and there appears no sufficient reason for granting a rehearing.

The motion is denied.

Holmes & Stanley and *C. Brown* for proponents.

A. S. Hartwell; Kinney, McClanahan & Cooper and *J. J. Dunne* for contestants.

Mr. Justice Galbraith dissents.

KEE KAN, NG LAI, NG YEE, KONG YEE, KONG LUNG,
LOY HOCK LOCK and CHEN WAI, copartners doing
business under the firm name of KWONG LEE YUEN &
CO., *v.* THE MANCHESTER FIRE ASSURANCE
COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 2, 1904.

DECIDED JUNE 4, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The Board of Health ordered the Fire Department to destroy by fire, because of infection by bubonic plague, the buildings within a certain described area. The engineer of the department before burning the condemned buildings set fire to three buildings in close proximity to but outside of the area named, from which three buildings the fire accidentally spread until it reached and destroyed property insured by the defendant. The policy provided that the insurer should not be liable for "loss caused directly or indirectly * * * by order of any civil authority." Held, that if the burning of the three buildings was necessary or was reasonably believed to be necessary to prevent the spread of the fire from the condemned block to the remainder of the city and if the fire was set for that purpose, the order of the Board of Health was the proximate cause of the loss of the insured property, within the meaning of the exception, and the insurer is not liable.

OPINION OF THE COURT BY PERRY, J.

Assumpsit for \$750 on a contract of fire insurance. The buildings insured were situate on Maunakea street, between Hotel and King, and were destroyed in the conflagration of January 20, 1900. The defense was that the loss was caused directly or

indirectly by order of a civil authority, an excepted cause, and in support of that defense evidence was introduced tending to show that the fire which destroyed the plaintiffs' buildings spread from a fire started by order of the Board of Health of the Republic of Hawaii in that portion of Block 15 bounded by Kukui, Nuuanu and Beretania streets and the easterly side of the Kaumakapili Church premises and a line in continuation thereof to Kukui street. In rebuttal the plaintiffs adduced evidence tending to show that the fire had been started by the Chief Engineer of the Fire Department, or by his order, in a building, numbered 47 on a map of the locality in evidence, without the boundaries of the section ordered burned and that from that building or from two other buildings, numbered respectively 48 and 45 and also without the boundaries referred to, the fire spread to a steeple of the Kaumakapili Church and thence from building to building until it reached the plaintiffs' property. On motion the presiding judge directed a verdict for the plaintiffs on the ground that the loss was shown not to have been from an excepted cause. The main question before us is as to the correctness of this instruction.

The provision of the policy relied upon by the defendant is that "this company shall not be liable for loss caused directly or indirectly * * * by order of any civil authority." On January 19, 1900, the president of the Board of Health addressed to Andrew Brown, Fire Commissioner, the following communication: "You are hereby authorized by resolution of the Board of Health to destroy by fire all the structures within the limits of the area described as follows:" (description substantially as above) "all of these structures inclosed in the above boundaries having been condemned by the board as infected by plague and ordered destroyed by fire". The resolution referred to had been duly passed by the Board. The buildings within the designated area were all, or nearly all, destroyed by fire on January 20, 1900. If the fire within that area passed from building to building, unaided by any efficient, intervening cause, to the insured property, then the order of the Board of Health was the proxi-

mate cause of the loss of the plaintiffs' buildings. *Hawaii Land Co. v. Ins. Co.*, 13 Haw. 164. Whether the evidence at the trial was such as not to permit of a finding that the fire did so spread from that area, it is unnecessary to say. The evidence did permit of and would have amply supported a finding that while the chief engineer started the fire in No. 47 and also set fire to Nos. 48 and 45 before setting fire to any of the buildings within the area, he did so for the purpose of creating a gap between that area and the rest of the town lying to the west and thus protecting the rest of the town from the fire which he had been ordered to start and which he knew he would start immediately afterwards. The chief engineer is dead and was unable to testify himself as to the reasons which led him to start the fire where he did, but the evidence as to the careful disposition made by him beforehand of the engines and other apparatus of the department and other evidence in the case would clearly support the finding that his sole purpose was to carry out the order of the Board of Health with as little loss and danger as possible to the portions of the town not ordered destroyed.

If the chief engineer set fire to Nos. 47, 48 and 45, not in the execution of the order received, but to gratify ill will or hatred on his part against the owners of those buildings, then the fire so set or his act was an efficient intervening cause breaking the chain of connection between the order and the loss and the order would not be regarded in law as the cause of the loss. But, in our opinion, the authority to burn the designated area (that the Board of Health had color of authority to destroy condemned buildings by fire sufficient to constitute it a civil authority within the meaning of the policy, see *Haw. Land Co. v. Ins. Co.*, *supra*) carried with it to the same extent the authority to do all acts reasonably necessary to execute the order or request and at the same time to protect to the greatest possible degree from a spread of the fire the remainder of the town; and if the burning of Nos. 47, 48 and 45 was reasonably necessary for those purposes or was reasonably supposed by the chief engineer, in good faith, to be necessary, the order of the Board of Health was

the direct and proximate cause of the burning of those three buildings and, by means of the chain thus established, the direct and proximate cause of the loss of the plaintiffs' building. That the engineer committed, if he did, an error of judgment as to the necessity for the preliminary burning, cannot break the chain of causation so far as this case is concerned, whatever the rule might be in an action by the owners against the engineer. Such error of judgment could not of itself constitute an efficient intervening cause or render the act of the engineer such.

The mere fact that the fire was started without the boundaries described could not of itself render the act of the person setting it an efficient, intervening cause. For example, if a small pile of wood had been made just without the line and against one of the buildings within the area and set on fire for the purpose of thus communicating the fire to the buildings within and from the heap of wood the fire had spread to the plaintiffs' buildings, could it be successfully denied that the order of the Board was the proximate cause of the loss? We think not. So also if in the place of buildings 47, 48 and 45 three heaps of tree trimmings or other rubbish had stood, and these had been deemed a menace, if allowed to remain, as a means of spreading the fire about to be started to the portion of the city to the west and had been for that reason burned, and the fire had spread therefrom to plaintiffs' buildings, would not the order of the Board be the proximate cause of the loss? We think it would.

What the result would be if numbers 47, 48 and 45 were burned by mistake, on the supposition that they were within the designated area it is unnecessary to say at this time. In accordance with the foregoing views the evidence permitted of a verdict for the defendant and for that reason the direction to find for the plaintiffs was erroneous. The other exceptions need not be considered. The verdict is set aside and a new trial ordered.

Hatch & Ballou for plaintiffs.

Robertson & Wilder for defendants.

CONCURRING OPINION OF FREAR, C.J.

I will add a little to the foregoing. As pointed out in *Hawaii Land Co. v. Lion F. Ins. Co.*, 13 Haw. 164, the proximate cause cannot be determined solely by abstract or scientific reasoning on causal relations or solely by reasoning by analogy from the law of torts. This is an action of contract and what is the proximate cause depends on the intention of the parties as shown by the contract construed in the light of circumstances and it is a matter of considerable importance what the cause insured against is and what the excepted cause is. It is immaterial within certain limits whether the order of the board of health was strictly legal or not or whether, if the board or the Territory were suable in tort, they would be liable to any of the parties injured. It is also immaterial for the purposes of this case whether the property first set on fire without the condemned area consisted of valuable buildings of innocent third parties or of mere heaps of rubbish. In cases of this kind the first of two alleged causes may be the proximate cause although there is no physical connection between the two and the second is set in motion merely to prevent the anticipated consequences of the operation of the first. For instance, in *Insurance Co. v. Boon*, 95 U. S. 117, in which the risk was fire and the exception invasion or usurped power (not merely directly or indirectly by invasion but "by means of" invasion), the rebel forces were attacking the city when the commander of the Union forces ordered an officer to destroy the military stores to prevent them from falling into the hands of the enemy. The officer destroyed them by setting fire to the city hall in which they were stored and the fire spread from one building to another until the insured building was burned—all before the enemy entered the city. It was held that the invasion, not the order of the commander, nor the act of the officer in destroying by burning rather than in some other way, was the proximate cause and that the loss therefore was within the exception and the insurance company not liable. See also cases cited in that case. In one of them, in which the captain

burned his ship to prevent her capture by the public enemy, it was held that the fire was caused by the enemy. If it had been caused by the captain, there could have been no recovery. Similarly, where a captain threw overboard a quantity of money to prevent its falling into the hands of the enemy. In such cases the immediate act or cause is regarded as done or occasioned *ex justa causa* and the more remote is considered as the *causa causans* which set in motion the agency that contributed to the destruction or which created the necessity for the immediate act or cause.

In the present case we must assume as a fact that in pursuance of the order of the board the buildings in the condemned area were to be burned and also that they were to be burned at that time. If that required the burning of the three outside buildings in order to prevent the spread of the fire to another section of the city, the order was the proximate cause of such burning, if such burning was for that purpose. That of course would be true if the outside buildings were burned for that purpose after instead of before the condemned buildings were set on fire. They could be burned before as well as after for that purpose. That is, assuming that the fire department would have acted under the order of the board if it had burned the condemned buildings at that time without first burning the outside buildings and that such outside buildings and another section of the city would probably have been burned by the spread of the fire, the order of the board could be considered the proximate cause of the burning of the outside buildings if they were burned separately either before or after the firing of the condemned buildings in order to prevent such spread of fire. Thus it cannot be said as matter of law that the burning of the outside buildings by the fire department was an intervening independent self-operating efficient cause and it was error to direct a verdict on that theory.

CONCURRING OPINION OF GALBRAITH, J.

I concur in the order sustaining the exception to the direction

of the verdict for the reason that, in my opinion, there was sufficient evidence to support a verdict for the defendant; hence taking the case from the jury and directing a verdict for the plaintiff was error.

R. W. McCHESNEY, J. M. McCHESNEY and F. W. McCHESNEY, carrying on business together in copartnership under the firm name of M. W. McCHESNEY & SONS, *v.* THE KONA SUGAR COMPANY, LIMITED, a corporation, and THE FIRST AMERICAN SAVINGS & TRUST COMPANY OF HAWAII, LIMITED, a corporation.

APPEAL FROM CIRCUIT JUDGE, THIRD CIRCUIT.

SUBMITTED MAY 14, 1904.

DECIDED JUNE 4, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

In an equity suit for the foreclosure of an equitable lien and for the appointment of a receiver, objections that the lien averred extended to a part only of the property sold, that the averment of insolvency was insufficient and that the decree of sale was, for these reasons and otherwise for want of equity in the complainants' case, beyond the jurisdiction of the court, will not avail when made for the first time in this court.

OPINION OF THE COURT BY PERRY, J.

(Galbraith, J., dissenting.)

In March, 1902, the complainants filed before the Circuit Judge of the Third Circuit, in equity, a bill, the main aver-

ments of which were as follows: That the respondent, The Kona Sugar Co., was established for the purpose of cultivating sugar cane and manufacturing sugar and generally to carry on a sugar plantation and general agricultural business; that the respondent is indebted to the complainants in the sum of \$189,826.05 for goods sold and delivered and for advances made; that the complainants hold the bonds of the respondent to the amount of \$100000 as a pledge to secure the said sum of \$189,826.05; that the whole of this sum remains due and unpaid, although demand has been made therefor; that the respondent is also indebted in other large sums of money to various other persons for goods sold and delivered, for work and labor done, for material supplied, for rents of some of the lands held by it under leases and for taxes assessed upon its property, all of which are long since overdue; "that the above mentioned advances by plaintiffs to said defendant company were made under a contract whereby plaintiffs were to act as agents for said defendant company for a term of ten years from October 1, 1898, for the sale of all sugar produced by the said defendant company, and said defendant company were to consign and deliver to plaintiffs for sale all such sugar and out of the proceeds of all such sales plaintiffs were authorized and empowered under such contract to reimburse themselves for all such advances made by them to said defendant company for its use; that such contracts constitute an equitable lien in favor of plaintiffs upon all the crops of sugar cane grown by said defendant company and on all the sugar produced by said defendant company therefrom during the term of said contract"; that in December, 1900, the respondent issued \$200000 of first mortgage bonds, secured by deed of trust of all its property both present and future, but that no action has been taken by the trustee towards foreclosing under said deed; that the respondent holds in fee and under lease certain parcels of land in North Kona, Hawaii, and is possessed of a mill, a partially constructed railway, rolling stock, animals and agricultural implements, all of which property is used by it in its said business; that the cane upon 1200 acres of the respondent's lands

has matured or is ready for harvesting or is fast approaching maturity; that the respondent "is without funds or means for carrying on its said business or harvesting its present crop of sugar cane or of manufacturing therefrom sugar or other products of sugar cane or of completing its said railway, which railway is necessary for the harvesting of said sugar cane, and in consequence has ceased to operate its said business, that its laborers, mechanics and other servants have not been paid their wages and salaries for some time past, and that said defendant company has neglected and is neglecting to harvest its said crop of sugar cane or manufacture sugar therefrom: that the said crop of sugar cane is deteriorating and that the whole crop of sugar cane which is of the value of \$200000 and the other property of the said defendant company are in immediate danger of being lost, injured or wasted from the neglect and incompetency of the said defendant company to harvest such crop of sugar cane and to manufacture sugar therefrom, that the lessors of certain of said lands held by said defendant company, the Kona Sugar Company, Limited, under lease and upon which the said sugar cane is now standing have threatened to institute and are about to institute proceedings to recover possession of the said lands and to cause a forfeiture of such leases for breach of the condition of said leases, to wit, that the rents thereby reserved have not been paid when due and the lessees' covenants for the payment of such rents have not been observed and performed; that there is also great danger that the property of said defendant company or some part of it may be sold in order to pay the taxes so assessed upon it and which taxes are now in default; that the plaintiffs have no plain, adequate and complete remedy at law either to enforce their said lien on said crop of sugar cane and the sugars to be produced therefrom or to obtain the payment by the said defendant company, The Kona Sugar Company, Limited, of those of its debts guaranteed by the plaintiffs; that it is necessary and proper and will be in the interests of all the creditors of defendant company, The Kona Sugar Company, Limited, and all others interested in the assets thereof, that a fit and

suitable person be appointed by this Honorable Court to take possession of all the assets of the said defendant company, The Kona Sugar Company, Limited, and to act as Receiver thereof under the orders of this Honorable Court." The prayer of the bill is that an accounting be had to ascertain the amount due the complainants, that their claim be decreed a lien on the crop of cane and the sugar and its proceeds, that the respondent be ordered to pay complainants' claim, that a sale be ordered of all the assets of the respondent or of some portion thereof sufficient for the purpose of satisfying the lien, that respondent be decreed to pay the lien out of the proceeds of such sale, that a receiver be appointed of all the assets of the respondent and that the respondent be decreed to make such transfer or conveyances to the receiver or purchaser as may be necessary and appropriate.

The Kona Sugar Co. answered, denying that any lessors had threatened proceedings or that the contract alleged constituted an equitable lien, admitted the truth of all the other averments of the bill, and prayed that the bill be dismissed upon final hearing, but consented that a receiver *pendente lite* be appointed. The Trust Company also, in its answer, consented to the appointment of a receiver pending the determination of the suit. A receiver was appointed in March, 1902, of all the property, and retained possession and conducted the plantation until the property was finally sold, on May 9, 1903, in pursuance of an order of the court made on April 20, 1903. It may be added at this point that on the petition of the Kona Sugar Co. itself the court had, in November, 1902, ordered a sale of all the assets of the respondent, but two attempts to sell made in December following by the receiver proved futile, no bids being offered.

In February, 1903, William W. Bierce, Limited, the present appellant, asked and thereafter obtained leave of the court to join the receiver as a defendant in its petition in intervention, wherein the petitioner claimed the ownership and right of possession of a certain railroad, engines, cars and other goods then in the possession of the receiver. On May 30, 1903, Wm. W. Bierce, Ltd., filed a protest against the confirmation of the sale

and motion that the attempted sale be declared "to be no sale", the sole ground stated being that the order of sale purported to include, and the receiver to sell, the railroad and other property claimed in the petition for intervention. The objection and motion were overruled and the sale confirmed. It is from this order of confirmation that the case now comes to this court by appeal.

At no time before the circuit judge was objection made by any of the parties to the appointment of the receiver, to his continuance in office, to his possession of any of the property except as above stated, to the order of sale, or to the jurisdiction of the court to make any of the orders which were made. It was on the argument of this appeal that the jurisdiction of the court was first questioned. The contention, and the sole contention, now advanced is that the circuit judge had no jurisdiction either to appoint the receiver or to order a sale of all the assets of the Kona Sugar Co.

Much of the law now involved was definitely laid down by this court in the recent case of *Kuala v. Kuapahi*, ante 300, 301, and needs no further statement. "It seems to be pretty well settled", it is there said, "that, as it is variously expressed, although neither consent nor negligence will confer jurisdiction in equity where none really exists, yet, when the case is not wholly foreign to equity jurisdiction, when it is not on its face such that equity could have no jurisdiction over it, as, for example, an action to recover damages for an assault, or for a libel or slander, when the defect is a want of equity and not a want of power, when the objection is merely that a plain, adequate and complete remedy at law exists or that equity is without jurisdiction in the particular case merely for some special reason or the absence of some particular element, when equity is competent to grant the relief sought and has jurisdiction of the subject matter, when the case is not without traces of equity jurisdiction, the question of the alleged want of jurisdiction may be waived and will be deemed to have been waived if not raised until the case comes to the appellate court." If the case at bar is one of that class, there can be no doubt that the question of the alleged want

of jurisdiction must be deemed to have been waived. The facts concerning consent and failure to object are undisputed.

The case before the circuit judge was not one that was wholly foreign to equity jurisdiction. It possessed distinct traces, at least, of equity jurisdiction. The complainants averred that they had made certain advances to the respondent under a contract the terms of which were such as to give them a lien on the cane and sugar of the respondent, and they asked that the lien be declared and enforced. It may be that on demurrer the averments of the facts disclosing the intent to create a lien would be held insufficient, but that was at most a defect which could have been remedied by amendment if the point had been seasonably raised. The ultimate fact of the existence of the lien was alleged. The enforcement of an equitable lien is something which is peculiarly within the province of a court of equity and the usual mode of enforcement is by a decree of sale of the property to which the lien attaches. Equity will enforce such a lien against a corporation as well as against an individual. The appointment of a receiver *pendente lite* is also within the powers of a court of equity, the object of the appointment being to preserve the property pending a determination of the rights of the litigants. In the bill in this case much was averred that would naturally appeal to the court as good ground for the appointment of a receiver. The cane was mature and deteriorating; the railway for its harvesting was uncompleted; the laborers had not been paid for some time and might cease work at any moment; the company's financial condition was such that it was unable to harvest the crop and was neglecting to do so and by reason of such inability and neglect the crop was in immediate danger of being injured and lost; the rents of some of its lands were unpaid and proceedings to enforce forfeitures, with consequent loss of the lands, were threatened; and the taxes were in default and tax sales were feared. Whether or not this could be held, on demurrer, to be a sufficient averment of insolvency, we need not say. From the facts averred the inference would not be an unreasonable one that the company was insolvent, whether inabil-

ity to pay debts or insufficiency of assets to meet the debts be regarded as the true test of insolvency. But insolvency in the sense that the liabilities of the company exceeded its assets, it was not indispensable to show. The issue before the court on the application for a receiver was whether or not such appointment was necessary to preserve the property pending the litigation and certainly sufficient was averred and admitted to justify the court in making the appointment, so far as the cane and sugar were involved.

In the nature of things, it was impracticable for a receiver to take charge of and care for the growing cane and manufacture the mature portions of it into sugar without taking possession and control of all other property used in connection with the plantation. The custody of the latter was necessarily incidental to the custody and care of the former.

The fact that the sale was through a receiver and not through some other officer was, if the procedure pursued was erroneous, at most a mere irregularity. Moreover, it is within the powers of a court of equity, when it has taken possession of property, *pendente lite*, through a receiver, to order a sale, even before the final determination of the litigation, whenever the best interests of the parties so require. It is also within its power to sell the property in order to pay the expenses of the receivership. The facts in this case were that the receiver, because of insufficient mill capacity, lack of labor or for other reasons, was unable to harvest the crop with sufficient promptness, and that during his incumbency the property of the company deteriorated and his expenses and liabilities increased at a greater rate than the income. The Kona Sugar Co. itself asked that all of its property be sold; the court was satisfied that it was for the best interests of all concerned that it should be; and no one interested objected to the making of the order although the attorney for this appellant objected at the time of the sale as to certain of the property on the ground that the title was not in the company. The final proceeds of the sale, it may be noted, were insufficient to pay the expenses of the receivership.

The point is also urged that, in the absence of a statute, the receiver was not by the order of his appointment vested with the title to the real estate. However that may be, the court of equity, if it possessed, as we think it did, the power to enforce a lien by a sale, possessed also the power to make its decree effective. Whether the title is to be regarded as having passed from the company under the receiver's deed made by order of the court, or whether the company should be decreed to execute a conveyance to the purchaser, we need not say. The lack of a deed is not something that the present appellant may complain of.

The case was within the general scope of the jurisdiction of a court of equity and was not without traces of equity jurisdiction. The defects complained of cannot avail the appellant at this stage.

On the merits no objection is made to a confirmation of the sale. The appeal cannot be sustained.

Hatch & Ballou for Wm. W. Bierce, Ltd.

Cathcart & Milverton for complainants.

Mr. Justice Galbraith dissents.

BEFORE THE JUSTICES AT CHAMBERS.

In re THE TREASURER.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED MAY 18, 1904.

DECIDED JUNE 4, 1904.

FREAR, C.J., GALBRAITH AND PERRY, JJ.

The Treasurer of the Territory may under certain circumstances consult private counsel as to his official duties and employ them to institute a suit in his name to sustain his convictions of his official duties and obligations and pay reasonable compensation to such counsel out of the appropriation for "incidental" expenses of his office.

OPINION OF THE COURT BY GALBRAITH, J.

The Treasurer of the Territory appeals from the ruling of the Auditor refusing to issue a warrant on the appropriation for "incidentals" of the Treasurer's office covering an expense of \$500.00 for attorneys fees which the Treasurer incurred in a suit against the Superintendent of Public Works.

The suit in which this expense was incurred was an injunction proceeding brought to restrain the Superintendent of Public Works from turning over to the county authorities, under the late county law, the Honolulu Water Works and appurtenances, the Treasurer taking the position that the county law was void and that the contemplated action of the Superintendent of Public Works was illegal; that the property produced a large revenue to the Territory and as it was his duty under the law to collect all revenue due the Territory it was his duty to bring this

suit to prevent the loss of revenue to the Territorial Treasury that would result from such transfer.

It is contended on behalf of the Auditor (1) that the Treasurer was not a party in interest in the issue of said suit and therefore had no right to bring the same; (2) that the Attorney General is the authorized legal representative of the Territory and should represent its executive officers unless good cause is shown for his not doing so; (3) that the action of the Treasurer in employing independent counsel was unwarranted and illegal; (4) that the fee of five hundred dollars is excessive.

Had the Treasurer such an interest in the issue involved in that injunction suit as to enable him to maintain the same as party plaintiff?

Section 72, Organic Act, creates the office of Treasurer of the Territory of Hawaii and reads: "That there shall be a treasurer, who shall have the powers and duties of the minister of finance and those of the powers and duties of the minister of the interior which relate to licenses, corporations, companies, and partnerships, business conducted by married women, newspapers, registry of conveyances, and registry of prints, labels, and trade marks under the laws of Hawaii, except as changed in this Act and subject to modification by the legislature."

Section 655, C.L., prescribes some of the duties of the minister of finance now devolved upon the Territorial Treasurer, and under which his obligation and duty to bring the suit is placed, as follows:

"It shall be the duty of the minister of finance to have a general supervision of the financial affairs of the Republic (Territory) and to faithfully and impartially execute the duties assigned by law to his department. He is charged with the enforcement of all revenue laws; the collection of duties on foreign imports; the collection of taxes; the safe-keeping and disbursement of the public moneys, and with all such other matters as may, by law, be placed in his charge."

If the Treasurer believed, in good faith, as is alleged, that the contemplated action of the Superintendent of Public Works would injuriously affect the revenues of the Territory then it is

clear that it was his duty under the law to bring the suit and he had such an interest therein as to enable him to maintain the same as plaintiff. This conclusion finds support in the recent decision of this court, *Keola v. Hale*, ante 419, holding that a tax collector may sue in his own name for taxes due the Territory whether such taxes were assessed by him or his predecessor in office.

The Attorney General is the law officer of the Executive department of the Territorial Government. It is his duty to appear on behalf of the Territory in all courts of record in all criminal cases and in civil cases in which the Territory is a party or interested. (Section 1013, C.L.). The Territory was not a party to this suit in which the expense in question was incurred by the Treasurer nor does it appear that the Territory was directly interested therein as said by the Attorney General in his letter to the Auditor advising a refusal to pay the claim, "This suit, as it turns out, was a private matter", meaning no doubt that the suit arose out of a difference of opinion between the Treasurer and the Superintendent of Public Works as to their respective duties under the law.

Even if it were admitted that the Territory was interested in this suit it does not follow that this contention of the Auditor can be sustained for the reason that this suit grew out of a difference of opinion between two executive officers of the Territory. The Attorney General neither in person nor by deputy could appear for both sides. He could only represent one of the parties and as he did appear for the Superintendent of Public Works the Territory and the public had the benefit of his services in the controversy. The well-known attitude of the Attorney General in regard to the law of the question at issue (the legality of the county law) placed his views in antagonism to those entertained by the Treasurer and under such circumstances it would have been a useless form for the Treasurer to have sought the "advice and counsel" of the Attorney General before employing private counsel to represent his view of his official duty under the law.

The statute also provides that it shall be the duty of the Attorney General to "give advice and counsel", "without charge" to all executive officers of the Territory "when called upon" (Section 1015, C.L.).

This statute makes provision for legal advice and counsel, without charge, to all executive officers of the Territory but does not pretend to compel any officer to seek such "advice and counsel", much less to make the opinion of the Attorney General the controlling legal authority for such officials. The contention that the Attorney General has the right to insist that all executive officers first seek his "advice and counsel" before consulting private counsel finds as little support in the statute as the claim that he has the right to supervise the expenditures of the fund appropriated for the "incidental" expenses of the Treasurer's office.

We take it to be clear, under the circumstances of this case, that the Treasurer had the right to consult and employ private counsel to bring the injunction suit and to pay them reasonable compensation out of the "incidental" appropriation for his office.

The evidence given at the hearing fully established the reasonableness of the fee of five hundred dollars.

It follows that the appeal must be sustained and that an order will issue if necessary directing the Auditor to issue the warrant as requested.

E. C. Peters, Deputy Attorney General, for Auditor.

Kinney, McClanahan & Cooper for Treasurer.

CONCURRING OPINION OF PERRY, J.

The view that the Treasurer had not under the law sufficient interest or authority to enable him to bring and to maintain the suit against the superintendent of public works, is, I am inclined to think, without so deciding definitely, correct, but, even if it is, it does not follow, as it seems to me, that the expenditure in question must be disallowed. If the treasurer believed that he had the necessary authority and that the duty devolved upon him to bring the proceedings and thus protect the territorial revenues, he was justified in consulting those learned in the law as to the

correctness of his views and, upon being advised that such views were correct and that it was his duty to bring the suit, to employ legal assistance to prosecute it. That the view of the treasurer and of counsel was incorrect, if it was, does not affect the question now before us. It cannot be said that the law is so clearly to the contrary as to indicate that the treasurer or his attorneys did not act or could not have acted in good faith. Under the circumstances of this particular case concerning the previously expressed views of the attorney general upon the issue then involved and the position taken by that official in defending the county law, and in view of the fact that the controversy was between two officials of the government and that the attorney general could not represent both sides, the treasurer was authorized and justified in seeking such advice from private counsel. To have first consulted the attorney general would have been a useless form.

The total appropriation of \$9000 in two lump sums for "Incidentals Treasurer's Office" in itself shows that the legislature intended that some discretion should be left to the treasurer in determining what expenses should be paid out of that item. That discretion cannot be said to have been exercised arbitrarily or unreasonably in this instance, in the payment for legal advice sought upon a point as to which the officer was in doubt and assistance in the institution and conduct of the suit. The law does not require that the person appointed to fill the office of treasurer shall have had special training in the law, and Congress and the legislature must be deemed to have known that questions might present themselves to that officer for a proper solution of which the advice of an attorney would be proper and essential. Ordinarily such advice and assistance should be sought of the law officer of the government, appointed and paid for that purpose, but in this instance, as already pointed out, there was justification for seeking it from other counsel.

The fee in controversy was reasonable.

Mr. Chief Justice Frear concurs in the conclusion.

Decisions Announced without Opinions During the Period Covered by this Volume.

No. 51. ANNA GERTZ IN HER OWN BEHALF AND AS EXECUTRIX OF THE WILL OF CHRISTIAN GERTZ, DECEASED, v. J. ALFRED MAGOON, IN HIS PERSONAL CAPACITY AND AS TRUSTEE FOR C. H. BANNING AND B. R. BANNING, JOHN BUCKLEY AND MARIA J. FORBES. Motion filed November 25, 1903, for an order to strike from the files a decision by Circuit Judge Gear dated June 27, 1901, a decree by said judge dated June 27, 1901, "a judgment or ruling" by said judge dated December 10, 1902, and a decision of this court, dated March 6, 1903, rendered on appeal from the above mentioned decision, decree and judgment of the Circuit Judge, and further to have transferred to the Chief Justice of this court as Chancellor the original and the amended bills filed respectively on April 6, 1901, and on August 25, 1902, and all other papers in the cause, the motion being based on the ground that the Circuit Judge had no jurisdiction in the matter and that the Chief Justice of this court, as Chancellor, has such jurisdiction. Submitted December 4, 1903. Decided December 18, 1903. *Per Curiam*. Motion denied.

No. 60. ANNA GERTZ IN HER OWN BEHALF AND AS EXECUTRIX OF THE WILL OF CHRISTIAN GERTZ, DECEASED, v. J. ALFRED MAGOON, IN HIS PERSONAL CAPACITY AND AS TRUSTEE FOR C. H. BANNING AND B. R. BANNING, JOHN BUCKLEY AND MARIA J. FORBES. These are two appeals, filed respectively on the

third and on the tenth days of June, 1903, from a ruling of the Chief Justice of this court refusing to issue a writ of mandamus directing the respondents to restore possession of certain land alleged to have been illegally sold under certain foreclosure proceedings claimed to have been invalid and to pay damages for waste alleged to have been committed on said land. Submitted December 4, 1903. Decided December 18, 1903. Circuit Judge DeBolt sat in place of Chief Justice Frear, disqualified. *Per Curiam*. No appeal lies from the ruling of the Chief Justice. Moreover, the ruling appealed from was correct. Upon the facts stated in the petition, relief by mandamus could not be granted. The appeals are dismissed.

No. 19. IN THE MATTER OF GEORGE A. DAVIS, AN ATTORNEY AT LAW. Petitions for Rehearing. Submitted February 25, 1904. Decided February 27, 1904. The judgment of disbarment was rendered on August 10, 1903, at the October, 1902, term. Within the thirty days allowed by Rule 11 of this Court, which provides that "a petition for rehearing may be presented only within thirty days after the filing of the opinion," the respondent filed on September 2, 1903, a petition for rehearing and on September 5, 1903, a supplemental petition for rehearing, which petitions were heard at the November session of the present term and denied on January 19, 1904. Three other petitions for rehearing have been subsequently, during the present term, filed, the first on January 27, the second on February 2 and the third on February 19. The attorney general moves to strike these three last mentioned petitions from the files. *Per Curiam*. The motion is granted and the three petitions are stricken from the files.

No. 88. *In re* ASSESSMENT OF TAXES, MARY A. RICHARDS. Appeal from Tax Appeal Court, First Taxation Division. Sub-

mitted February 23, 1904. Decided March 2, 1904. (1) Land on Vineyard Street, mauka side, between Nuuanu and Liliha, Kauluwela, Honolulu. Area 2.25 acres. Returned at \$8000; assessed at \$14000. Valued by Tax Court at \$8000. (2) Improvements on land just described. Returned at \$6500; assessed at \$8000. Valued by Tax Court at \$6500. Appeal by assessor. *Per Curiam*. Valuations appealed from affirmed. *Castle & Withington* for tax-payer. *Robertson & Wilder* for assessor.

No. 93. *In re* ASSESSMENT OF TAXES, HAWAIIAN TRAMWAYS COMPANY, LIMITED. Appeal from Tax Appeal Court, First Taxation Division. Submitted March 7, 1904. Decided March 10, 1904. Track, cars, horses, mules, land, leases, franchises, etc., assessed as a whole as an enterprise for profit. Returned at \$39,454.56. Assessed as of January 1, 1903, at \$125,000. Assessment sustained by Tax Court. Appeal by Taxpayer. *Per Curiam*. Valuation of the Tax Appeal Court affirmed. *Castle & Withington* for taxpayer. *Robertson & Wilder* for assessor.

No. 96. *In re* ASSESSMENT OF TAXES, THE BERNICE P. BISHOP ESTATE. Appeal from Tax Court, First Taxation Division. Submitted March 3, 1904. Decided March 22, 1904. Eighty acres of rice land and four thousand one hundred and thirty-five acres of pasture land located at Punaluu, Oahu, under 15 year lease (with 13 years unexpired) for net annual rental of twenty-five hundred dollars. Returned at \$20000.00 and assessed at \$25000.00. Assessment approved by Tax Court. Taxpayer appeals. *Per Curiam*. Valuation approved by Tax Court affirmed. *Holmes & Stanley* for taxpayer. *Robertson & Wilder* for assessor.

No. 95. *In re* THE APPEAL OF THE TREASURER OF THE TERRITORY OF HAWAII FROM THE RULING OF THE AUDITOR. Submitted April 4, 1904. Decided April 6, 1904. The Auditor moves to dismiss the appeal on the grounds that there is not that "difference of opinion" between the parties referred to in Section 16 of the Audit Act necessary to authorize the appeal and that the Treasurer is not a "party aggrieved" or "concerned" within the meaning of that Section. *Per Curiam*. The motion is denied. *E. C. Peters*, Deputy Attorney General, for movant. *Kinney, McClanahan & Cooper, contra*.

RESOLUTION.

WHEREAS, WILLIAM LUTHER WILCOX, a member of the Bar of the Supreme Court of the Territory, and District Magistrate of Honolulu, has been taken from us by death;

RESOLVED, That the members of the Bar here assembled place on record our feeling of personal loss in his death and our sincere appreciation of his genial disposition as a man; his sound common sense and ability to read human character as a judge and his trustfulness as a friend.

RESOLVED, That we extend our sympathy to the widow and brothers of Judge Wilcox in their affliction.

RESOLVED, That these resolutions be spread upon the minutes of the Supreme Court.

Dated July 27, 1903.

RESOLUTION.

S. K. KA-NE was highly respected by all his acquaintances and greatly beloved by all his friends. His bright and well cultivated mind, his quiet demeanor, his genial disposition secured for him a high place not only at the Bar but also in public life. As a lawyer he was careful and painstaking, and in public affairs he was steadfast in holding his course, if he believed himself to be in the right. When he died the Bar lost an honorable member and the Territory lost a useful citizen, whose influence was exerted to allay racial strife, and to promote good government; therefore

RESOLVED, That the Bar Association of the Hawaiian Islands hereby expresses its deep sorrow at the loss it has sustained in the death of MR. KA-NE, and its sympathy for his widow and relatives, and respectfully moves this Honorable Court to spread this memorial upon its records.

Dated January 11, 1904.

MR. E. P. DOLE. If the Court please, the Bar Association desires to present a memorial of love and admiration for the late Judge Estee:—

RESOLUTION.

WHEREAS, HONORABLE MORRIS M. ESTEE, late Judge of the United States District Court of the Territory of Hawaii, has completed a distinguished and noble life, and has left an inspiring example of civic and private virtues; therefore

RESOLVED, That it is the duty and privilege of the Bar Association of the Hawaiian Islands to render its tribute to a man, to a citizen, a statesman and a judge whom to know was to love and to honor.

That we tender our heartfelt sympathy to his family.

We move that this resolution be spread upon the records of the Court.

Honolulu, November 2, 1903.

If the Court please, for more than thirty years Morris M. Estee was a prominent citizen of California. In the Republican Convention of 1888 he made a national reputation. We have known of him for a long time, but until he came among us three years ago practically few of us knew him personally. I doubt if there is a man in this Territory today who in a lifetime has won the universal good-will of all our people to the extent that Morris M. Estee won it in three years.

He once told me that for more than twenty-five years he was never worth less than \$250,000. Shortly before his appointment to the Bench he lost every dollar he had, except his library.

He was a man of political ambitions, and about this same time, as is generally believed, he was elected Governor of California and was counted out. The counting out, under the circumstances, was a coronation, for it was a tribute to his splendid courage, to his independence, and to his spotless honesty.

He was one of the most tender and devoted of fathers, and only a few weeks before he came here he laid a loved daughter in the grave. These heavy blows, following one after another in quick succession, would have broken most men of his years, but he came to us a stranger, buckled down to duties that were new to him, did magnificent work, put himself in touch with all the people of this Territory and won all our hearts. He did this by a remarkable combination of personal qualities; he had the nerve and sand of a thoroughbred. I know that he felt his misfortunes more keenly than most men do, but he never troubled strangers with them. He never whined and he never threw up his hands. He was the best post-prandial speaker in this Territory since Paul Neumann's death. He was an active and honored brother of great fraternities,—the Masons, the Odd Fellows, the Knights of Pythias,—that side by side with the churches and other institutions are doing a mighty work for the ennobling of humanity, for bringing peace on earth and good will to men.

He was a man built on broad-gauge lines, a man of world-wide and tender sympathies, absolutely without cants.

One of his finest and noblest traits was his abiding loyalty to his friends. It was my honor and my privilege to be one of his closest friends in this Territory, and when I was breaking down under trouble greater than I could bear, it was his staunch friendship and the staunch friendship of his noble wife and of others like that that saved me from the insane asylum or the grave.

I loved Judge Estee and God knows if there is a man in this Territory that had reason to love him I am that man. We love the man for his personal qualities; we measure the Judge by his

judicial qualities,—I want to say a few words about Morris M. Estee as a Judge.

He was industrious, learned and brainy. No more conscientious man than Morris M. Estee ever adorned the judicial position. It was his sole desire as a Judge to know what was right, and I know through my relations with him how he studied early and late, day and night, that feeble, stricken old man, until within a week of his death, to know what was right and to do it.

In criminal cases it was his rule, and I have always believed it is a sound one, to deal sternly with men convicted of deliberate and brutal crimes, especially crimes upon women and children, and to be lenient with offenses which do not spring from a wicked and cruel heart. I am not aware that more than one of his decisions has been reversed—his decision in the Mankichi case. I always regarded that case as close and the result doubtful. I would not have dared to have some twenty men re-arrested as they left the doors of this Court-house after being set free by Territorial judges, or by the Territorial judge, unless I had believed it was my duty to take extraordinary risks to prevent some twenty-eight men convicted of murder, manslaughter, rape, robbery and arson from being turned loose on this community, to prevent almost every civil verdict obtained here in the period of two years from being set aside, and to prevent, if possible, revenues of this Territory amounting to about three million of dollars from being declared collected in violation of the Constitution of the United States, to the bankruptcy of this Territory. The case not only involved great interests of this Territory but it was one of a series of cases, which involved the sustaining or the reversing of the policy of President McKinley and President Roosevelt, in line with the policy adopted by the Republic of Hawaii during the Transition Period. These cases involved the constitutionality of the existing governments of the Philippine Islands and Porto Rico, with their ten millions of people. These cases involved the question whether the United States is so hampered by constitutional limitations that it cannot take its place

among the powers of the earth, among the nations of the earth as a world power.

Judge Estee's decision was not a guess. He saw that the question would be up to him, and to my personal knowledge his decision in the Mankichi case was the result of months of diligent study when he saw it was coming.

I had the honor in that case of crossing swords with Mr. Couderd, who is one of the recognized leaders of the New York Bar upon questions of constitutional law, and I doubt if his argument before the Supreme Court was stronger than Judge Estee's decision rendered here. Every constitutional lawyer in the United States who belongs to what is known as the School of Strict Constructionists believes that Judge Estee's decision in that case was right, that the four Justices of the Supreme Court of the United States who endorsed that decision were right, and that the five Justices who constituted the majority of the court were wrong, and of the two men on that tribunal, the most honest legal tribunal on earth,—the two men who are generally considered by the profession as the profoundest lawyers there,—one of them took one side and the other took the other, and Mr. Justice Harlan, who is considered, I believe, by the profession as perhaps the strongest lawyer on that great tribunal, endorsed Judge Estee's decision in terms as emphatic as the English language is capable of.

To be reversed under such circumstances casts no reflection upon the dead jurist's legal learning and grasp of intellect.

Looked at in a broader light these cases were but a phase, a battle, in a contest 115 years old. George Washington and Alexander Hamilton were Liberal Constructionists. John Marshall, perhaps the greatest jurist that ever lived, was a Liberal Constructionist. Thomas Jefferson was a Strict Constructionist, yet a certain opportunity tempted him to violate his theory and secure the mouths of the Mississippi and almost double the territory of the United States. A generation later the giant battles of Daniel Webster and John C. Calhoun were fought out on these lines. The Civil War grew out of the slavery question,

but the Union armies justified their course as legal by a Liberal interpretation of the Constitution of the United States, and the Confederate armies justified their course by a strict and narrow construction of the Constitution of the United States, and to the great questions that arose out of the Civil War and came before the Supreme Court of the United States these same lines were drawn, and I don't remember one of them that was rendered by an undivided Court.

The fact is that constitutional and statute law, not to the same extent as common law but to a certain extent, adapts itself to changing conditions and to great public exigencies as the bark of a tree adapts itself to the growing fibres within, and just so long as we have free government and just so long as men's minds are not cast in the same mould, men will differ as to where the exact line should be drawn between free and strict construction.

I have taken the liberty of speaking of this case at such length for the reason that I know that many people blame Judge Estee and Territorial Judges for opinions upon which the best legal minds in the United States are divided; for the reason, too, that I know that Judge Estee regarded it as the case of his lifetime. I know that he was greatly disappointed at the result. He told me on my return from Washington that the decision violated the fundamental principles of the Constitution of the United States; that it vested the Congress and the President of the United States with powers which the Constitution did not give them, and that the time would come when the people of the United States would bitterly repent the decision.

Judge Estee's active brain and his big, warm, generous, loyal, loving heart are still in death, but the lesson of his pure and manly life abides with us as an inspiration. In behalf of the Bar Association of the Hawaiian Islands and voicing as I believe the sentiment of this entire community, I move that the resolution be spread upon the records of this court.

MR. HARTWELL. I have the honor to second the motion that has just been made, and I desire to say a few words only con-

cerning a certain feature of Judge Estee's judicial period in the Federal Court of Hawaii.

When Judge Estee came to Hawaii, a little over three years ago, he found a newly established Territory, in different conditions from those of any former Territories of the United States. He found here a body of law established on the system of the Common Law of England, (that glorious heritage of America), the growth of over fifty years of judicial ascertainment in the Hawaiian Islands. He found that, during that long term of years personal rights under that system of law had been carefully and jealously guarded by the Judiciary of Hawaii and that Congress in its Organic Act for the Government of Hawaii had enacted that all actions, rights of action, suits, judgments and prosecutions of the Republic of Hawaii should continue in as full force as if the Organic Act had not been enacted. He found here a large body of Statute Law, the work of the Hawaiian legislatures, which, with few exceptions, had been re-enacted by Congress as the laws of the Territory of Hawaii in so far as those laws were not inconsistent with the Constitution of the United States. Who could say then that those Hawaiian statutes, expressly made law by force of the Act of Congress and in no other way, without reference to their Hawaiian origin, were not laws of the United States having the same force and effect as any other United States statutes? The Supreme Court of the United States had not then decided certain law questions, since decided, concerning the applicability of the Constitution of the United States to personal rights in Hawaii.

Nothing was easier for an unwise and unthinking judge in that responsible position than to encourage or suggest premature and unnecessary litigation upon questions of this nature, which might result in great danger to the interests of this community, which might produce a conflict of jurisdictions between this Supreme Court of the Territory and the United States Federal Court. It seems to me that Judge Estee showed remarkable sagacity in avoiding any such course, and I feel desirous to

place on record my humble tribute of regard for his memory for that fact.

MR. STEWART. May it please the Court, with a smile that I shall never forget, with a grasp of the hand that went to my heart, with a tenderness of voice that seemed truly fatherly, Judge Estee, on his first appearance in this very court-room, drew me to his great heart and took me into the charmed circle of his friendship. In that circle, it was my blessed privilege to remain until his death, enjoying an intimacy with him that shall be the pride and comfort of my soul forever and forever.

I could not leave entirely to his older friends all the moments of this sacred hour without failing to perform an obligation, which my saddened heart prompts me to render to the memory of one who was great in goodness and good in greatness unto even the least of his brethren.

“Our little systems have their day;
They have their day and cease to be;
They are but broken lights of thee,
And thou, O Lord, art more than they.”

“If the clock strikes the hour, I am ready to go. I would rather live; but I am not afraid to die.” So said Judge Estee to a friend while his life was hanging by a thread. The clock struck the hour and he arose and went out into the great world beyond the river, where the surges cease to roll.

Referring to the uncertainty of life, Hamilton says: “We shall be in the midst of some great work, when the tools shall drop from our fingers, and we shall work no more. We shall be planning some mighty project—house, business, society, book—when in one shattering moment all our thoughts shall perish. Life shall seem strong to us, when we shall find that it is done.”

But there is no such thing as an accident; there happens no untimely event in the course of human affairs. There is a providence in all and over all from the sweep of a planet to the fall of a sparrow, from a birth to a death. Judge Estee's departure from this life was to us sudden, and to him and his, in a sense,

unexpected—the sudden culmination of a physical derangement, which gave no warning of its approach, until the bugle blast of its deadly attack rang out upon our startled ears. But his life's work was done. God knew when to take him.

What a striking fact, that he and his assistant, Miss Ryan, had just put the finishing touch to the volume of his decisions, which will form the first volume of the reports of the United States District Court for the Territory of Hawaii; that the final proof was just read, and all the details of publication disposed of, when Judge Estee closed the doors of his chambers and left this building never to return. How strange—that a ship was at the pier just in time to receive his body for the last sad journey to the home of his early manhood!

It is there now. Slowly and sadly they will lay him down to rest, until the trump of the arch-angel and the voice of God shall announce the dissolution of the earth and the resurrection of the dead.

But though he had gone from us, yet he still lives with us. As our resolutions declare, he has left "an inspiring example" unto us, and it will live forever.

"We can chant in happy measure
As they slowly pass along;
Though they may forget the singer,
They can not forget the song."

If we profit from Judge Estee's life, we shall strive to be more practical in following our belief in the brotherhood of man.

We shall not only see in every human being a brother, but we shall classify him in every relationship of life, not by the accident of birth, not by color, or by race, but by capacity, by culture, by character. In his attitude toward Oriental immigration, Judge Estee sought only to preserve the American standard of civilization, to protect the plain people, who are the salt of the nation, from debasement by virtue of competition with a race whose standard of living enables them to work for wages which would cheapen American workmen and bring degradation to

their homes. He shared none of the vulgar prejudice against the Oriental as a man. He stood simply for the preservation of the American social, moral and economic standard.

If we profit from Judge Estee's example, we shall make the acquisition of money a secondary consideration in the problem of life. We shall follow the path of duty, whether it leads to comfort or entails self-denial. "I would rather be right than be president" will go ringing down the centuries to generations yet unborn, and wherever men shall hear it, they will say, Surely these are the words of a real hero. Judge Estee did not ascend to the top of the ladder of political success because he prized his self-respect too highly to become a pawn, because he was too independent to be a puppet. And he died poor in this world's goods because his honesty preferred the possession of a good name, and an "inspiring example" to leave as a legacy to the generations to follow after him. He has often said to me, when I have fled to him as my earthly ark or refuge, "Better poverty than dishonest gain; better defeat than submission, when you believe you are in the right."

While there are other good men left unto us, men who draw on our hearts as we catch glimpses of their good qualities, yet my life here will not seem the same without Judge Estee. Although I knew that he loved me, yet I never for a moment felt that in my practice before him I could expect the slightest favor which the law and the facts would not justify. And thereby hangs the glory of our professional life. I care not who is on the bench, if I can feel assured that the only test that will be applied to my case is, what are the facts and what is the law.

In a eulogy on Judge Clement, Judge Cullen, of the New York Bar, before both of whom I practiced, said: "Were I to pick out the distinguishing features of Judge Clement's judicial career and service, I should say it was the conscientious industry of his work and his intellectual honesty. I do not, of course, refer to pecuniary honesty, or to ability to stand up against extraneous influence. It would be a poor compliment to a Judge were that all you could say of him. God forbid the time shall

ever come when that will be said of a Judge as praise. That should go without the saying. By intellectual honesty I mean the conscientiousness with which he did his work."

And thus it may be said of Judge Estee. Indeed, so it has been said of him in a way and from a source that make our poor words seem but poor echoes of themselves. In the affirmances by the Circuit Court of Appeals of Judge Estee's decisions, we have the greatest eulogy that can be pronounced upon the judicial work of the departed jurist. "To him the law was what it was designed to be,—the science of justice, which defends the rights of person and property, interposing its powerful arm between the strong and the weak, settling their rights according to one uniform standard of even-handed justice to all, which affords sure and certain protection to man's rights, giving energy to enterprise, vigor and cheerfulness to industry and life, and elasticity to patriotism."

When the convention was about to adopt the Declaration of Independence, a son of the keeper of the old State House in Philadelphia was stationed at the door of the hall with directions to cry out to his father in the belfry, as soon as the vote was announced, "Ring, father, ring!" The Declaration was adopted; the boy cried out to his father, and the old man pulled the ropes and the bell proclaimed the doctrine of universal freedom and equality; and down to this day the echo of that proclamation is ringing around the world.

So here, Judge Morris M. Estee, now of blessed memory, pulled the ropes, and the bell from his court-room proclaimed to this land and to this people, that "American law is common justice", and that proclamation will go down the centuries.

MR. ANDREWS. There are many offices which in themselves cast a glamor over their occupants and give to them a greatness by reason of their merely holding the office. Such an office might well have been the office of Federal Judge in this Territory, and especially of the first Federal Judge. We were a new Territory; we were a people who had never had a United States Court in our midst,—people the bulk of whom were Americans

by birth or descent and who had left their country, and for the first time we were to have a Federal Court and hear interpreted and laid down the doctrines of United States law. Therefore to any man holding that position a certain greatness and a certain glamor would have resulted; but we cannot say that in the case of the first occupant of that bench, the Honorable Morris M. Estee, this was the case. Instead of the office coming to Judge Estee—and greatness and a glamor—Judge Estee, by his reputation, by his ability, by the history of his life, gave to the office of the District Court of the United States for the Territory of Hawaii a greatness which it would not otherwise have obtained.

Judge Estee was one of the pioneers of California. He was one of the men who had made history and made law in the early days of that magnificent State, and therefore it was fitting that, when Hawaii came under the American flag, one of the leaders and the pioneers of that great commonwealth should come here to be our first Federal Judge, and as such he was welcomed by the people and we had no cause to regret his coming.

Judge Estee, as has been so well said by the other speakers and by the public press of this community, and as has been said on the street corners and in the houses of the different families here, was loved by all who knew him. He had a peculiarly lovable disposition and his qualities attracted those who were ignorant even of his past reputation. His great features of endearment to my mind were his sterling patriotism, the strong quality of his Americanism and his absolute honesty.

It is needless for me to take further notice of these facts, the speakers who have preceded me have so clearly brought out and dwelt on them, and people who lived in this community and came in touch with the late Judge know him so well, but we have honored him and we feel that by coming down here he has honored the bench that he held and honored the community and the Territory of Hawaii, and it gives me great pleasure to second the resolutions as Attorney General of the Territory of Hawaii.

MR. HOGAN. May it please the Justices of this Court, I want to add one single word. Out in that distant land, I know not where it may be, the soul and spirit of a man exists that did everything that he could for the profession that you gentlemen honor and respect. Woe to me, I cannot express it to you, gentlemen, because I knew him from his boyhood,—from his manhood. There never was a more gentle character that came under my knowledge.

There never was a man in the great State of California that did more for the young members of the profession in which he was a shining, absolute and complete light, than Morris M. Estee. Out of my existence,—why I don't know,—has gone something that I can never recall except in memory. His life was such that when that ship that goes across the seas from these Islands shall touch the wharves and piers of San Francisco, there will be given to him the proper demonstration that an honest man receives and should receive and deserves.

What my personal relations with that gentleman may have been in the past cuts little figure, but really my heart gives me the inspiration of saying that I loved him and that other men loved him as men should love men. It is a pleasure to me to say a word or two here before you people, who may have known him long and who may not have known him long. Out of this existence went a man kindly of heart, truthful of character, beautiful socially, a man and a jurist.

CHIEF JUSTICE FREAR. All the members of the Bench have enjoyed an acquaintance with Judge Estee and have shared in the feeling of high regard so generally expressed for him. Mr. Justice Galbraith's acquaintance with him has been especially close and I will call upon him to speak for the Court upon this occasion.

JUSTICE GALBRAITH. The good man is gone, the true friend has departed, the patriotic citizen has passed out from among us, the just judge has been called from his labors, and we honor ourselves in paying this tribute of affection to his memory.

When the great soul of Morris March Estee broke its fetters of clay and took its silent flight to the "undiscovered country, from whose bourn no traveller returns", the Judiciary of the Territory of Hawaii was deprived of a member whose labors will add lustre to its history and who lay down the ermine as stainless as when it fell upon his worthy shoulders.

Judge Estee not only possessed a great intellect, he had something more, namely, a good heart. No man ever was or ever can be truly useful and great without a good heart. To the public he was frank, candid and sincere. To his friends he was confiding, trustful and faithful. His sense of justice was acute; his courage unfaltering. His sympathies went out to the oppressed. He abhorred wrongdoing, yet looked with compassion on the wrongdoer.

In his early judicial experience he announced that life and property should be as safe upon the deck of an American ship, on the high seas, as they were any place under the flag on the land. This principle was a controlling one in all of his admiralty decisions and accounts in a measure for their excellence.

In the United States District Court for the Territory of Hawaii the master and able seaman stood before the bar of justice as equals. The captain of industry and the day laborer were measured out the same even-handed justice. In truth and in fact Judge Estee administered justice "without respect to persons, and did equal right to the poor and to the rich".

What greater eulogy can be pronounced of a judge than to say of him, as may be truthfully said of Judge Estee, that he did his duty, as he saw it, fearlessly, faithfully and courageously?

Judge Estee was a model citizen and easily the first American among us. He knew and understood the history and traditions of our country, and his love for its flag "amounted to a passion".

In the eloquent language spoken of another great American it may be said of Judge Estee, that "He was a minister of justice, called by the great because he was wanted, retained by the wise because he was useful, trusted by all because he was honest."

The resolutions presented by the Bar Association invoke a

responsive sympathy from the court. The motion is granted and the resolutions are ordered spread upon the minutes of the court.

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ABATEMENT.

1. One may abate as a nuisance so much of a dam as interferes with one's right of water. *Chee Kit v. Lee Lung*, 69.
2. In an action for assault and battery in attempting to abate a nuisance, it is error after excluding evidence of nuisance to instruct jury that plaintiff was justified in resisting by use of necessary force efforts of defendant in such abatement. *Ibid.*

ACCOUNTS.

Accounts receivable are not taxable. *In re Assessment of Taxes Brewer & Co., Ltd.*, 29.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ACKNOWLEDGMENT.

1. Registry of a chattel mortgage not certified to have been properly acknowledged is a nullity. *Lalakea v. Hilo Sugar Co.*, 570.
2. A notarial certificate to an instrument which does not state the fact of acknowledgment is invalid. *Ibid.*
3. Defect in the certificate to an instrument cannot be cured by oral testimony. *Ibid.*

ADVERSE POSSESSION.

1. Evidence held to show adverse possession as against kono-hiki. *Ii Estate v. Mele*, 124.
2. Where title by adverse possession has not been adjudicated in a court of law, equity will not entertain a suit to quiet title. *Kuala v. Kuapahi*, 300.
3. The Supreme Court will not of its own motion dismiss such a bill when the objection was not made in the trial court. *Ibid.*
4. Evidence held to support verdict against adverse possession. *Smith v. Hamakua Mill Co.*, 648.
5. A suit to determine water rights and judgment therein interrupt running of statute of limitations, and the period of prescription must commence anew. *H. C. & S. Co. v. Wailuku S. Co.*, 675.

AMENDMENTS.

1. It is the duty of a trial court to amend its record after trial to make it conform to facts as to presence of defendant at different stages of trial. *Territory of Hawaii v. Ferris*, 139.
2. A court may properly refuse an amendment changing a party defendant, one of several sued as trustees, when no showing is made of the appointment of the proposed new party as trustee. *Mossman v. Damon*, 401.

APPEAL.

1. An order that an attorney pay into court money paid by his client to him after the distribution of an estate is final as to him and he may appeal therefrom in his own right. *In re Estate of da Silva*, 13.
2. A notice of appeal from a District Magistrate must be signed by the appellant or someone on his behalf. *Territory of Hawaii v. Aki*, 63.
3. On appeal findings of trial judge in his decisions and order are sufficient record of presence of defendant at different stages of a criminal case. *Territory of Hawaii v. Ferris*, 139.
4. When objection to equity jurisdiction of a suit to quiet title on ground that plaintiff's title by adverse possession has not been adjudicated at law is not made in trial court it comes too late in the Supreme Court and that Court should not of its own motion dismiss the bill for such cause. *Kuala v. Kuapahi*, 300.
5. A defect in method of bringing a question to the Supreme Court does not render its decision absolutely void. *Brown v. Brown*, 308.
6. An appellant's notice of appeal to a circuit judge at chambers and appeal bond will prevail over the certificate of the District Magistrate that the appeal was to the Circuit Court. *Kala v. Mills*, 422.
7. An appeal to a "Circuit Court, General Appeal. In Chambers" is an appeal to a Circuit Judge at chambers. *Ibid.*
8. Where a Circuit Court has without jurisdiction dismissed an appeal taken from a District Court to a Circuit Judge at chambers the Supreme Court will sustain an exception and remand the case to the Circuit Judge. *Ibid.*
9. A decision by a District Magistrate setting aside a judgment and order of default is interlocutory and no appeal lies therefrom. *Lyman v. Winter*, 424.
10. Appeal from District Magistrate on points of law dismissed, no question of law being presented. *Mundon v. Kaeo*, 432.
11. Allowance of undue latitude in cross-examination resulting in bringing out matters of defense is not reversible error unless plaintiff is prejudiced thereby. *Ahmi v. Waller*, 497.

APPEAL.—Continued.

12. When the memorandum of a tax assessment is ambiguous, the construction placed upon it by the parties before the Tax Appeal Court and by that court itself will prevail on appeal. *In re Taxes John Ii Estate*, 546.
13. "Applicant" construed to mean "appellant" in statute providing for executions pending appeal. *Hall & Son v. Dickey*, 590.
14. The statute providing for execution pending appeals from District Magistrates for good cause shown unless the defendant shall furnish bond to pay judgment in appellate court does not deny appellant the right to trial by jury nor the equal protection of the laws. *Hall & Son v. Dickey*, 590.
15. A verdict will not be reversed for error that clearly appears to be not prejudicial. *Ahana v. Ins. Co. of North America*, 636.
16. Objections to sale in equity on foreclosure of equitable lien, that the lien extended to only a part of property sold, that averments of insolvency are insufficient and that the decree of sale was beyond jurisdiction of trial court for want of equity will not avail when raised for the first time on appeal. *McChesney v. Kona Sugar Co.*, 710.
17. No appeal lies from a ruling of the Chief Justice of the Supreme Court refusing to issue a writ of mandamus. *In re Gertz*, 723.

APPROPRIATIONS.

1. The legislature may properly divide the biennial fiscal period into two parts in contemplation of the inauguration of county government and limit certain appropriations to one portion and others to another portion of that period. *In re Boyd*, 361.
2. When called in extra session for the consideration of appropriation bills, the legislature may make appropriations for any rightful subject of legislative appropriation. *In re Queen's Hospital*, 514.
3. When the legislature provides for certain necessary expenses of government for six months only of the biennial period on the supposition that the expenses for the rest of the time would be borne by counties under an Act later held void, the treasurer with the advice of the governor may pay such expenses for the last 18 months of the biennial period according to the appropriations for the preceding biennial period but not according to the appropriations for the first six months of the existing period. *In re Hawaiian Star*, 532.
4. An appropriation may lawfully be made for a hospital which is conducted for the relief of indigent sick without distinction as to race, etc. *In re Queen's Hospital*, 663.

ASSAULT AND BATTERY.

In an action for assault and battery in an attempt to break down a dam, it is reversible error to exclude evidence that the dam is a nuisance and also instruct jury that defendant had shown no right to justify his attempt to break down the dam. *Chee Kit v Lee Lung*, 69.

ASSUMPSIT.

1. One partner may sue another in assumpsit where the cause of action is distinct from the partnership account and does not require their examination. *Holmes v. Mello*, 72.
2. Where an express promise is nothing more than the law would imply under the circumstances it is optional with the plaintiff whether to declare on the implied promise or to set out the contract specially. *Ibid.*
3. No writ should be issued in an action of assumpsit to prevent a defendant from leaving the Territory. *O. L. & B. Co. v. Ding Sing*, 412.

ATTORNEY GENERAL.

1. The attorney general can appoint a deputy to act for him in criminal prosecutions. *Tong Kai v. Territory of Hawaii*, 612.
2. The Treasurer is not bound to follow advice of Attorney General but may employ other counsel at public expense, when acting in good faith to sustain his conviction of his official duties. *In re Treasurer*, 718.

ATTORNEYS AT LAW.

1. After a final order of distribution of an estate, an attorney of an heir should not be ordered to pay into court a sum paid by his client to him. Such an order is final for purposes of appeal and the attorney may appeal therefrom in his own right. *In re Estate of da Silva*, 13.
2. A court of law can not in the absence of statute allow fees in the nature of counsel fees against a losing party. *Allen v. Lucas*, 52.
3. It is not error for a court to fail to assign counsel for a defendant before it appears that defendant is indigent and in absence of request by defendant for assignment. *Territory of Hawaii v. Ferris*, 139.
4. Attorney suspended for one year for serving a new client against a former one in the same matter in which he represented his former client. *In re Humphreys*, 155.
5. An attempt by an attorney to persuade another attorney to betray his client, an aged credulous man, merits disbarment. *Ibid.*
6. An attorney should not be suspended or disbarred unless the

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court is clearly satisfied of his guilt. *In re Davis*, 220; *In re Humphreys*, 155.

7. To impede a settlement solely for purpose of securing an extortionate fee, to abuse process of courts in order to extort money from a man with dread of litigation, to compel a client by threats and intimidation to pay a large fee is gross misconduct in an attorney that merits disbarment. *In re Davis*, 220.

8. The charging of an excessive fee, is not ground for disbarment when done in good faith, without use of improper methods and the client is satisfied. *In re Magoon*, 244.

9. That a judge some years ago punished an attorney for contempt of court does not of itself show bias against the attorney now, in a disbarment case. *In re Davis*, 377.

10. The fact that an attorney has received \$5,000 from a railroad company in course of settlement of litigation then pending during which he is alleged to have done acts meriting disbarment, does not render a judge owning stock in the railroad disqualified from sitting in the disbarment proceedings. *Ibid.*

11. A rehearing of a disbarment proceeding will not be granted on the ground that respondent did not have time to properly prepare defense when no such complaint was made at original hearing. *Ibid.*

12. Neither evidence nor complaint by a client aggrieved is indispensable in a disbarment suit. The Supreme Court may of its own motion cause an investigation. *Ibid.*

13. It is not irregular for disbarment proceedings to be instituted by the filing of an information by the Attorney General. *Ibid.*

14. Ratification by a client of misconduct of an attorney does not bind the court. *Ibid.*

15. That defendant is a District Magistrate at time of disbarment proceedings is no defense. *Ibid.*

16. A practitioner before the Supreme Court who was licensed by the Supreme Court of the Republic may be disbarred by the Supreme Court of the Territory. *Ibid.*

17. Guardian held entitled to fee of \$250 as compensation for services as attorney in resisting application of ward for termination of guardianship. *In re Humeku*, 394.

18. Attorneys' commissions should not be included in determining the jurisdiction of District Magistrate. *Hall & Son v. Dickey*, 590.

19. The Attorney General has no right to insist that all executive officers first seek his counsel before consulting private counsel. *In re Treasurer*, 710.

AUDITOR.

1. The Auditor is not obliged to issue warrant for payment of fire claim to awardee without the authority of other claimants when the award is made "subject to interest of" such other claims. *In re John F. Colburn*, 4; *In re En Syak Aseu*, 7.
2. The Auditor is entitled to clear proof of the validity of a claim before issuing a warrant therefor. *In re Royal Ins. Co.*, 9.
3. An award subject to a subrogation of awardee to an insurance company does not entitle the insurance company to a warrant for the amount of its claim for insurance paid the awardee. *Ibid.*
4. The Governor has no power to suspend the Auditor. *In re Austin*, 114.

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A Land Commission Award issued in the name of a deceased konoiki inures to the benefit of her heirs. *Smith v. Hamakua Mill Co.*, 648.

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2. Certiorari lies in case a District Magistrate issues execution pending appeal without allowing the defendant a hearing. *In re Hutchins*, 624.

3. The Supreme Court can issue a writ of restitution in a proper case on certiorari but will not do so in absence of notice to the plaintiff below. *In re Hutchins*, 672.

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1. A court at law has no authority to allow fees to guardians ad litem to be paid by the opposite parties. *Allen v. Lucas*, 52.

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1. The decision of a de facto court cannot be questioned collaterally, even by minors. *Brown v. Brown*, 308.

2. A divorced wife can not collaterally attack a corporation on ground that as a married woman she was incompetent to sign articles of association. *Brown v. Carter*, 333.

3. The actions of de facto officers constituting a Board of Medical Examiners in recommending licenses of physicians cannot be collaterally attacked by revocation of licenses on ground that

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4. A failure to separately assess the interests of a lessee in two sub-leases cannot be taken advantage of in a collateral attack on the assessment. *O. R. & L. Co. v. Ewa Plantation Co.*, 406 .

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1. An entry in record of proceedings of finding in favor of plaintiff and order of survey, setting out survey, makes notes of survey part of the decision, and the particular description therein will prevail over a general description in the decision. *McBryde Estate v. Gay et al.*, 117.

2. A map referred to in a survey of record becomes part of the description though the map be not recorded. *Ibid.*

COMMISSIONERS OF FIRE CLAIMS.

1. Award "subject to interest of" another claim. *In re Colburn*, 4; *In re En Syak Aseu*, 7.

2. Award "subject to the subrogation of this claimant to" an insurance company. *In re Royal Ins. Co.*, 9.

CONSTITUTIONAL LAW.

1. The right of trial by jury may be waived in civil cases by actions and conduct. *Ah Hing v. Ah On*, 59.

2. There is no constitutional right to challenge a grand jury panel. *Territory of Hawaii v. Ferris*, 139.

3. The constitutional provision that the accused in criminal prosecutions shall enjoy the right to have the assistance of counsel places no obligation on the Territory to provide counsel. *Ibid.*

4. The rule that a law shall embrace but one subject is violated by including in a law creating counties, provisions for a Territorial Board of Public Institutions, transferring to it duties and powers theretofore belonging to the Superintendent of Public Works. *Dole v. Cooper*, 297.

5. The legislature may properly divide the biennial fiscal period into two parts in contemplation of the inauguration of county government and limit certain appropriations to one portion and others to another portion of that period. *In re Boyd*, 361.

6. Radical changes in the system of Territorial taxation not incidental to county organization when contained in a law creating counties violate the provision that each law shall embrace but one subject, which shall be expressed in its title, and make the

CONSTITUTIONAL LAW.—Continued.

whole of it void. *Territory of Hawaii v. Supervisors, County of Oahu*, 365.

7. A court has no jurisdiction to adjudicate a person insane and appoint a guardian without notice to her. *In re Brash*, 372.

8. A writ of ne exeat may not be issued by a Circuit Judge in an assumpsit case brought in Circuit Court, as such a writ would subject the defendant to imprisonment for debt contrary to provisions of the Organic Act. *O. L. & B. Co. v. Ding Sing*, 412.

9. The statute providing for executions for good cause shown pending appeals from District Magistrates unless the defendant shall furnish bond to pay judgment in appellate court does not deny appellant the right to trial by jury nor the equal protection of the laws. *Hall & Son v. Dickey*, 590.

10. It is not in excess of the police power to forbid the keeper of any place where intoxicating liquors are sold to permit any minor to remain in the room where such liquors are sold. *Territory of Hawaii v. Cunha*, 607.

CONSTRUCTION.

1. Applicant construed to mean appellant. *Hall & Son v. Dickey*, 590.

2. Trustee construed to be equivalent to administrator. *In re Estate of Holt*, 580.

See STATUTES.

CONTRACT.

1. Where a defendant's express promise to pay is nothing more than the law would imply under the circumstances it is optional whether to declare on the implied promise or to set out the contract specially. *Holmes v. Mello*, 72.

2. In order that a note given by one partner for a partnership debt may preclude action against the partners on the debt all parties to both obligations must understand and assent thereto and the burden of proving such novation rests on the party relying on it. *Jan Ban v. Tsen Yim*, 433.

3. Evidence held not to prove hiring for a fixed compensation. *Bright v. Kawananakoa*, 622.

CORPORATIONS.

1. Stocks and bonds of private corporations are not taxable. *In re assessment of taxes, Brewer & Co., Ltd.*, 29.

2. When by reason of the skill and experience of the officers of a corporation, its good will, etc., the value of the tangible property is increased, such increase is the value of the tangible property and the tangible property is taxable at the increased value,

CORPORATIONS.—Continued.

but when the combined property of the corporation consists in part of taxable and in part of non-taxable property, and by reason of intangible elements the aggregate value is increased, such increment of value in so far as it is due to the non-taxable property is not taxable. *Ibid.*

3. In ascertaining the aggregate value of all property of a corporation the amount of its debts should be added to the selling prices of the shares of its capital stock. *Ibid.*

4. Directors are trustees of the corporation and must act for interests of stockholders, and salaries voted themselves will not be allowed to stand unless shown to be fair. *Bolte v. Bellina*, 151.

5. In the absence of a provision as to notice of corporation meetings the notice must be reasonable. But attendance at a meeting without objection will waive any unreasonably short notice. *Brown v. Carter*, 333.

6. Stock may be voted by proxy though its owner is present and voting other stock held in trust. *Ibid.*

7. A corporation may bind itself to retain in office a particular stockholder but there is an implication that he properly perform the duties of the office. *Ibid.*

8. A court of equity will not go through articles and by-laws and construe them with reference to various hypothetical states of fact and enjoin the corporation from wrongly enforcing some of them against plaintiff when it has not attempted to enforce any of them against him. *Ibid.*

COSTS.

Costs allowed by statute should not be included in determining jurisdiction of District Magistrate. *Hall & Son v. Dickey*, 590.

COUNTIES.

See APPROPRIATIONS.

1. There should be no new registration of voters for first election under County Act of 1903, but only those on registration list of 1902 are entitled to vote. *Fairchild v. Smith*, 265.

2. The portions of the County Act of 1903 which create a Territorial board of public institutions and transfer to it duties and powers of the Superintendent of Public Works are invalid because opposed to the rule that each law shall embrace but one subject. *Dole v. Cooper*, 297.

3. Contests of first county elections under County Act of 1903 cannot be instituted by electors or in the Supreme Court. *In re Contested Election*, 323.

4. The County Act of 1903 is void, as it makes radical changes in the system of Territorial taxation which are void under the

COUNTIES.—Continued.

provision that a "law shall embrace but one subject which shall be expressed in its title" and which are so essential as to warrant the belief that the legislature would not have passed the balance of the Act without the invalid parts. *Territory of Hawaii v. Supervisors, County of Oahu*, 365.

COURTS.

The decision of a de facto court cannot be questioned collaterally. *Brown v. Brown*, 308.

See SUPREME COURT, CIRCUIT COURTS, DISTRICT MAGISTRATES, PROBATE.

CRIMINAL LAW.

1. APPEAL. On appeal a finding of a trial judge in his decision and order are sufficient record of presence of defendant at different stages of a case. *Territory of Hawaii v. Ferris*, 139.
2. ARRAIGNMENT. At arraignment, a deputy of the Attorney General may read the indictment. *Ibid.*
3. ATTORNEY-GENERAL can appoint a deputy to act for him in criminal prosecutions. *Tong Kai v. Territory of Hawaii*, 612.
4. BRIBERY. To offer money to a deputy attorney general before the commission of an offense to influence him not to prosecute the offender is punishable under P. L. §255. *Ibid.*
5. ATTORNEY. The constitutional provision that the accused in criminal prosecutions shall enjoy the right to have the assistance of counsel places no obligation on the Territory to provide counsel. *Territory of Hawaii v. Ferris*, 139.
6. EVIDENCE. An accused has no right to have witnesses heard in his behalf by a grand jury. *Tong Kai v. Territory of Hawaii*, 612.
7. A conviction based upon the uncorroborated testimony of an accomplice is legal. *Ibid.*
8. JURY TRIAL. For a judge in a charge to a jury to give a synopsis of the evidence for the prosecution without referring to the evidence for the defendant is ground for a new trial. *Territory of Hawaii v. Dengiro*, 64.
9. Neglect to challenge grand jury before they retire waives the right, even though the defendant be in jail at the time. *Territory of Hawaii v. Ferris*, 139.
10. Use of intoxicating liquor by a jury during trial is not ground for a new trial where the minds of the jury are not affected thereby. *Ibid.*
11. Objections to grand jury are waived by failure to object until after verdict. *Tong Kai v. Territory of Hawaii*, 612.
12. The presumption is that grand jurors are good and lawful

CRIMINAL LAW.—Continued.

men and that not less than twelve concur in finding an indictment. *Ibid.*

13. MINORS. A law which forbids the proprietor of any place where liquor is sold to permit any minor to remain in the room where the liquor is sold, is constitutional. *Territory of Hawaii v. Cunha*, 607.

14. MITTIMUS. A mittimus to the High Sheriff is sufficient to authorize a prison keeper to hold a prisoner. It is not necessary that the prison keeper be furnished with either a mittimus or a certified copy of the judgment and sentence. *In re Ferreira*, 276.

13. MURDER. *Territory v. Dengiro*, 64; *Territory of Hawaii v. Ferris*, 139; *Territory of Hawaii v. Kimura*, 510.

16. PERJURY. See WITNESS *infra*.

17. WITNESS. One who has committed perjury is not thereby rendered incompetent as a witness unless a statute so provides. *Tong Kai v. Territory of Hawaii*, 612.

18. After conviction pending appeal, a witness should not be confined to await the possibility of a new trial. *In re Yasutaro*, 670.

19. HABEAS CORPUS. A decision discharging a prisoner on habeas corpus, though erroneous, conclusively determines that he was not liable to be held on the state of facts then existing, and it is error to remand the prisoner to custody, on removing the ground on which the first decision was erroneously made. *In re Ferreira*, 276.

DAMAGES.

1. A father is liable for damages caused by careless shooting by his infant child of seven years. *Victoria v. Palama*, 127.

2. Damages for detention of dower by a grantee of the heir, will be allowed in favor of one who has slept on her rights, only from date of demand. *Kahaleaahu v. Pereira*, 284.

DECREE.

Where a party is entitled to a dismissal without prejudice and the court so rules it should say so in the decree. *Ahlo v. Bolte*, 130.

DEED.

See EQUITY, DESCRIPTION.

DEFAULT.

See JUDGMENT.

DEFINITIONS.

1. Full cash value. *In re taxes, Castle*, 1.
2. Enterprise. *In re assessment of taxes, C. Brewer & Co., Ltd.*, 29.
3. Combined property. *In re assessment of taxes, C. Brewer & Co., Ltd.*, 29.
4. Record. *Allen v. Lucas*, 52.
5. Abutter. *Smith v. Rose*, 289.
6. Imprisonment. *Oahu Lumber & Bldg. Co. v. Ding Sing*, 412.
7. Biennially. *In re Haw. Star Newspaper Assn.*, 532.
8. Applicant. *Hall & Son v. Dickey*, 590.
9. Come or be brought before. *Tong Kai v. Territory of Hawaii*, 612.

DEPUTY ATTORNEY GENERAL.

1. In arraignment a deputy of the attorney general may read the indictment. *Territory of Hawaii v. Ferris*, 139.
2. The attorney general can appoint a deputy to act for him in criminal prosecutions. *Tong Kai v. Territory of Hawaii*, 612.

DESCENT.

Kindred of the half-blood are excluded from inheritance when not of the blood of the ancestor through whom the inheritance came to the intestate, by kindred of such blood, though of more remote degree. *Smith v. Hamakua Mill Co.*, 648.

DESCRIPTION.

1. A particular description in a survey set out in record of commissioner of boundaries will prevail over a general one in the decision. *McBryde Estate v. Gay et al.*, 117.
2. An unrecorded map referred to in a survey of land in a decision becomes part of the description. *Ibid.*
3. Where a deed refers to a patent a particular description of land in the patent prevails over a statement of area in the deed. *Ahmi v. Waller*, 497.

DISTRICT MAGISTRATE.

1. That respondent is a District Magistrate at time of disbarment proceedings is no defense. *In re Davis*, 377.
2. A certificate of appeal by a District Magistrate is not required by any statute or rule of court and cannot control the note of appeal and bond. *Kala v. Mills*, 422.
3. A District Magistrate has authority to set aside his own judgments and reopen cases when unsatisfied and unappealed, whenever in his discretion the ends of justice require it. *Lyman v. Winter*, 424.

DISTRICT MAGISTRATE.—Continued.

4. An order of a District Magistrate setting aside a judgment is interlocutory and no appeal lies therefrom. *Ibid.*
5. Attorneys' commissions and statutory costs should not be included in determining jurisdiction of District Magistrate. *Hall & Son v. Dickey*, 590.
6. District Magistrates may issue execution upon good cause shown in cases involving over \$20, notwithstanding appeal, if no bond is furnished to pay judgment on appeal. *Ibid.*
7. A District Magistrate may not issue a writ of possession pending appeal without good cause shown and an opportunity given the defendant to stay the writ by filing a supersedeas bond. *In re Hutchins*, 624.
8. Certiorari lies in case a District Magistrate issues execution pending appeal without allowing defendant a hearing. *Ibid.*

DIVORCE.

1. Evidence held to support decree for defendant in action on ground of habitual intemperance. *Flint v. Flint*, 313.
2. A divorced wife cannot collaterally attack a corporation on ground that as a married woman she was incompetent to sign articles of association for the purpose of avoiding a part of the articles. *Brown v. Carter*, 333.
3. A motion for temporary alimony is properly denied when the court is not shown what property the libellee owns or what his income is. *Ferreira v. Ferreira*, 428.

DOWER.

1. Statute of limitation runs against a claim of dower from time either the widow or heir begins to claim adversely to the other. *Kahaleaahu v. Pereira*, 284.
2. Damages for detention of dower from an alienee of the heir in favor of one who has slept on her rights allowed only from date of demand. *Ibid.*

EJECTMENT.

See ADVERSE POSSESSION 1, 3, 4, 5; EQUITY 8.

ELECTIONS.

1. Under the provisions of the Organic Act and the County Act of 1903 there is no new registration of voters for the first county election, but only those on registration list of 1902 are entitled to vote. *Fairchild v. Smith*, 265.
2. All Territorial laws providing for contests of elections in the courts were repealed by the Organic Act. *In re Contested Election*, 325.

ELECTIONS.—Continued.

3. Decisions of inspectors of elections as to validity of ballots are not subject to revision by the Supreme Court. *Ibid.*
4. Contests of first county elections under County Act of 1903 cannot be instituted by electors or in the Supreme Court. *Ibid.*

EQUITY.

1. An injunction will be issued to prevent wrongful revocation by the Treasurer of a physician's license, there being no adequate remedy at law. *Ninomiya v. Kepoikai*, 273.
2. Equity has no jurisdiction over suit to quiet title where plaintiff claims title by adverse possession which has not been adjudicated in a court of law. *Kuala v. Kuapahi*, 300.
3. In such a case the question of want of jurisdiction may be waived and will be deemed waived if not raised until appeal, and the appellate court will not dismiss. *Ibid.* See *Brown v. Brown*, 308, and *McChesney v. Kona Sug. Co.*, 710.
4. Equity does not act directly on judgments nor is it a branch of equity jurisdiction to merely construe judgments. *Brown v. Brown*, 308.
5. A court of equity will not grant a mere declaratory decree upon the construction of conveyances. *Ibid.*
6. A court of equity will not go through articles and by-laws of a corporation and construe them with reference to various hypothetical states of fact and enjoin the corporation from wrongly enforcing some of them against plaintiff when it has not attempted to enforce any of them against him. *Brown v. Carter*, 333.
7. Equity will not reform a deed of all grantee's interest on ground of mistake where the parties speculated as to the possible interest of grantor even though neither thought the interest would exceed one-half when it actually was the whole. *Godfrey v. Kidwell*, 351.
8. Equity is not given jurisdiction of an ejectment suit against an owner not in possession, by calling such suit one for specific performance by the owner of a lease made by non-owners which the owner is estopped to deny. *Tai Lan v. Contrades*, 392.
9. Equity follows the statute of limitations by analogy. *Hilo v. Liliuokalani*, 507.
10. It is within the powers of a court of equity when it has taken possession of property through a receiver to order a sale before the final determination of the litigation for the best interest of the parties. *McChesney v. Kona Sugar Co.*, 710.
11. Objections to sale in equity on foreclosure of equitable lien, that the lien extended to only a part of property sold, that averments of insolvency are insufficient and that the decree of sale

EQUITY.—Continued.

was, for want of equity, beyond jurisdiction of court will not avail when raised for the first time on appeal. *Ibid.*

ESTOPPEL.

1. Petitioners in a case are estopped from attacking decree on ground of irregularity of proceedings, failure of service by publication on other parties. *In re Estate of Holt*, 580.
2. The bringing of a suit in equity which is dismissed on demurrer for lack of jurisdiction or because a cause of action is not stated does not estop the plaintiff from suing at law. *Bright v. Kawananakoa*, 622.
3. Equity is not given jurisdiction of an ejectment suit against an owner not in possession by calling such suit one for specific performance by the owner of a lease made by non-owners which the owner is estopped to deny. *Tai Lan v. Contrades*, 392.

EVIDENCE.

1. A judge in a charge to a jury has no right to give a synopsis of the evidence for the prosecution without referring to that for the defendant. *Territory of Hawaii v. Dengiro*, 64.
2. Evidence held to prove murder. *Territory of Hawaii v. Ferris*, 139; *Territory of Hawaii v. Kimura*, 510.
3. It is proper to sustain a general objection that evidence is immaterial, if immaterial for any purpose. *Flint v. Flint*, 313.
4. Discretion of trial judge in matter of cross-examination will not be reviewed by appellate court except in clear cases of abuse. *Ibid.*
5. Rehearing will not be granted in disbarment case on ground that a material witness was not called on the original hearing when there is no statement of what the witness would testify if called. *In re Davis*, 377.
6. It is not requisite that party aggrieved testify in a disbarment case. *Ibid.*
7. Extrinsic evidence is not admissible to prove facts that would allow substituted service of process, they must be shown by the officer's return. *Mossman v. Damon*, 401.
8. Tax books and assessment rolls are admissible evidence for plaintiff in a suit for delinquent taxes. *Keola v. Hale*, 419.
9. Evidence held to sustain finding that no express contract for moving house was made. *Redward v. Luttet*, 431.
10. The burden of proof rests on the party relying on a novation. *Jan Ban v. Tsen Yim*, 433.
11. Evidence of undue influence if indirect or circumstantial must be very clear and convincing in order to set aside a will. *In re Will of Notley*, 435.

EVIDENCE.—Continued.

12. Evidence held not to show undue influence. *Ibid.*
13. Allowance of undue latitude in cross-examination is not reversible error unless plaintiff is prejudiced thereby. *Ahmi v. Waller*, 497.
14. Oral testimony is not admissible to cure defect in certificate of acknowledgment. *Lalakea v. Hilo Sugar Co.*, 570.
15. The court in the matter of an estate should take judicial notice of all letters of administration hitherto issued in the matter of the estate. *In re Estate of Holt*, 580.
16. An accused has no right to have witnesses heard in his behalf by a grand jury. *Tong Kai v. Territory of Hawaii*, 612.
17. A conviction based upon the uncorroborated testimony of an accomplice is legal. *Ibid.*
18. One who has committed perjury is not thereby rendered incompetent as a witness unless a statute so provides. *Ibid.*
19. Evidence held to support finding of lack of agreement as to compensation between employer and employee. *Bright v. Kawanakoa*, 622.
20. Unsigned minutes of Board of Health admissible as evidence of passage of a resolution. *Ahana v. Insurance Co. of N. America*, 636.
21. The reopening of a case to introduce evidence is within discretion of trial court. *Ibid.*
22. Evidence held to support finding against adverse possession. *Smith v. Hamakua Mill Co.*, 648.
23. It does not necessarily follow from a discontinuance of irrigation of land to which water rights are appurtenant that the right to the water is abandoned. *H. C. & S. Co. v. Wailuku Sugar Co.*, 675.
24. The burden of proof is upon one making a diversion of water to new lands to prove that it has been made without injury to others. *Ibid.*

EXCEPTIONS.

1. Exceptions to a judgment do not prevent running of six months' limitation within which writs of error may be issued. *Tibbets v. Pali*, 137.
2. Where a Circuit Court has without jurisdiction dismissed an appeal taken from a District Court to a Circuit Judge at chambers, the Supreme Court will sustain an exception and remand the case to the Circuit Judge. *Kala v. Mills*, 422.

EXECUTION.

1. An alias execution may be good though the original is not. *Kalaniana'ole v. Dimond & Co.*, 486.

EXECUTION.—Continued.

2. Where judgment is given for defendants for costs in an action to quiet title, execution is issued and satisfied, there has been no execution satisfied in respect to the title to the land and plaintiff is not precluded from obtaining a writ of error. *Peabody v. Damon*, 628.

3. A District Magistrate may issue execution upon good cause shown in cases involving over \$20,—notwithstanding appeal, if no bond is furnished to pay judgment on appeal. *Hall & Son v. Dickey*, 590.

See WRIT OF POSSESSION.

EXECUTORS AND ADMINISTRATORS.

The word “trustee” in an appointment by the Probate Judge and in a resignation of office held to mean “administrator with the will annexed”. *In re Estate of Holt*, 580.

FARES.

See STREET RAILWAYS.

FEEES.

See GUARDIANS, 1, 3.

FIRE CLAIMS.

1. The Auditor is justified in not issuing warrant for payment of fire claim to awardee when the certificate of award states that it is “subject to interest of” other claims, without the authority of such other claimants. *In re John F. Colburn*, 4; *In re En Syak Aseu*, 7.

2. An insurance company is not entitled as awardee to a warrant because the award to owner of burned premises is made subject to a subrogation to the insurance company. *In re Royal Ins. Co.*, 9.

GARNISHMENT.

1. An order of default cannot properly be entered against a garnishee for failure to appear and answer at the opening day of the term. *Bank of Hawaii, Ltd., v. Parke*, 645.

2. If such order be entered, no valid judgment by default may be made against the garnishee while it remains unreversed. *Ibid.*

GOVERNOR.

The Governor has no power to suspend an officer who by the terms of the Organic Act may be removed with the advice and consent of the Senate and who is to hold for four years unless sooner removed. *In re Austin*, 114.

GRAND JURY.

See CRIMINAL LAW, 6, 8, 9, 10.

GUARDIANS.

1. A court of law has no authority to allow fees to guardians ad litem and order them paid by the opposite parties. *Allen v. Lucas*, 52.
2. A probate judge has no jurisdiction to appoint a guardian of an insane person where no notice has been given such insane person of the hearing. Such failure of notice is not waived by the presence of the alleged insane person at subsequent hearings upon annual accounts. *In re Brash*, 372.
3. A guardian allowed fee of \$250, for his services as attorney in resisting application by ward for termination of guardianship. *In re Humeku*, 394.

HABEAS CORPUS.

A decision discharging a prisoner on habeas corpus, though erroneous, conclusively determines that he was not liable to be held on the state of facts then existing and it is error to remand the prisoner to custody, on removing the ground on which the first decision was erroneously made. *In re Ferreira*, 276.

See CRIMINAL LAW, 12, 16.

HIGHWAYS.

An owner of land abutting on an abandoned street whose free access to his premises has not been affected by the abandonment has no right to demand that the land in the abandoned street be first offered to him before its sale to another. *Smith v. Rose*, 289.

HUSBAND AND WIFE.

1. Evidence held not to prove marriage according to Chinese custom, or common law marriage. *Territory of Hawaii v. Cheong Kwai*, 280.
2. A divorced wife cannot collaterally attack a corporation on ground that as a married woman she was incompetent to sign articles of association for the purpose of avoiding a part of the articles. *Brown v. Carter*, 333.
3. Evidence held to support decree for defendant in action for divorce on ground of habitual intemperance. *Flint v. Flint*, 313.
4. A motion for temporary alimony is properly denied when the court is not shown what property the libellee owns or what his income is. *Ferreira v. Ferreira*, 428.

INCOME TAX.

See TAXATION, 7.

INDICTMENT.

1. At arraignment, a deputy of the attorney general may read the indictment. *Territory of Hawaii v. Ferris*, 139.
2. The presumption is that not less than twelve grand jurors concur in finding an indictment. *Tong Kai v. Territory of Hawaii*, 612.

INFANTS.

See MINORS.

INFLAMMABLE OILS.

See TURPENTINE.

INJUNCTIONS.

1. An injunction may be obtained in equity to prevent an unauthorized revocation by the Treasurer of a physician's license, there being no adequate remedy at law. *Ninomiya v. Kepoikai*, 273.
2. Equity will not compel a corporation to keep in office one who does not perform his duties. *Brown v. Carter*, 333.

INSTRUCTIONS.

1. For a judge in a charge to a jury to give a synopsis of the evidence for the prosecution without referring to the evidence for the defendant is ground for a new trial. *Territory of Hawaii v. Dengiro*, 64.
2. It is proper for judge to direct verdict for plaintiff leaving jury to fix amount of damages, where facts are not disputed and show liability of defendant. *Victoria v. Palama*, 127.
3. The statutory provision that juries are exclusive judges of the facts does not prevent a trial judge from directing a verdict when there are no facts shown upon which a jury could properly base a verdict. *In re Notley*, 700.
4. In an action for assault and battery in an attempt to break down a dam it is reversible error to exclude evidence that the dam is a nuisance and also instruct jury that defendant had shown no right to justify his attempt to break down the dam. *Chee Kit v. Lee Lung*, 69.

INSURANCE.

1. A company which has received an assignment from the insured of its fire claim to the amount of insurance paid is not entitled as awardee to a warrant for payment of that amount on award to the insured "subject to the subrogation of this claimant to said company." *In re Royal Ins. Co.*, 9.
2. A fire caused by the fire department acting upon a letter from Board of Health in form authorizing it after resolution condemn-

INSURANCE.—Continued.

ing the building to be destroyed by fire because infected with bubonic plague is caused by civil authority. *Ahana v. Ins. Co. of North America*, 636; *Kee Kan et al. v. Manchester Fire Ass. Co.*, 704.

3. When insurance policy exempts losses by order of any civil authority it is not necessary that the order be lawful or justifiable if within the apparent scope of duties of the civil authority which has acted officially. *Ibid.*

4. An authorization from the Board of Health to the Fire Department to burn a certain area as infected is a proximate cause of the burning by the Fire Department of buildings outside that area to protect the remainder of the town from a spread of the fire. *Ibid.*, 704.

INTOXICATING LIQUOR.

1. Use of intoxicating liquor by a jury in a capital case is not ground for a new trial if defendant is not prejudiced thereby. *Territory of Hawaii v. Ferris*, 139.

2. A law is not unconstitutional which forbids the proprietor of any place where intoxicating liquor is sold to permit any minor to visit or remain in the room where the liquors are sold. *Territory of Hawaii v. Cunha*, 607.

JUDGE.

1. A judge is not disqualified in a matter of disbarment of an attorney because of rendering a previous judgment as to insanity of a client of the attorney, in a different case. *In re Davis*, 377.

2. That a judge some years ago punished an attorney for contempt of court does not of itself show present prejudice against him. *Ibid.*

3. The fact that an attorney has received \$5,000 from a railroad company in course of settlement of litigation then pending, during which he is alleged to have done acts meriting disbarment does not render a judge owning stock in the railroad disqualified to sit in the disbarment proceedings. *Ibid.*

4. The statutory provision that juries are exclusive judges of the facts does not prevent a judge from directing a verdict where there are no facts on which a jury could properly base a verdict. *In re Notley*, 700.

5. It is proper for judge to direct verdict for plaintiff leaving jury to fix amount of damages where facts are not disputed and show liability of defendant. *Victoria v. Palama*, 127.

JUDGMENT.

1. A judgment of a Circuit Court is not suspended by exceptions so far as to prevent running of six months limitation as to writs of error. *Tibbets v. Pali*, 137.
2. It is not necessary that a prison keeper be furnished with a certified copy of the judgment in a criminal case, a mittimus to the High Sheriff is sufficient to authorize the holding of the prisoner. *In re Ferreira*, 276.
3. The decisions of a de facto court cannot be questioned collaterally. *Brown v. Brown*, 308.
4. Equity does not act directly on judgments nor is it a branch of equity jurisdiction to merely construe judgments. *Ibid.*
5. District Magistrates have authority to set aside their own unsatisfied judgments in their discretion to promote the ends of justice. *Lyman v. Winter*, 424.
6. Judgment by default may not be entered against a garnishee for failure to appear on the opening day of the term, or while a void order of default remains unreversed. *Bank of Hawaii v. Parke*, 645.

JUDICIAL SALES.

See EQUITY, 10, 11.

JURIES AND JURY TRIAL.

1. The right of trial by jury may be waived by filing express waiver at a term before that of trial and by not suggesting a jury at the trial term until the second day of the hearing of the evidence on the assessment of damages. *Ah Hing v. Ah On*, 59.
For a judge in a charge to a jury to give a synopsis of the evidence for the prosecution without referring to the evidence for the defendant is ground for a new trial. *Territory of Hawaii v. Dengiro*, 64.
3. It is proper for judge to direct verdict for plaintiff leaving jury to fix amount of damages, where facts are not disputed and show liability of defendant. *Victoria v. Palama*, 127.
4. Neglect to challenge grand jury before they retire waives the right, even though the defendant be in jail at the time. *Territory of Hawaii v. Ferris*, 139.
5. Use of intoxicating liquor by a jury during trial is not ground for a new trial where the minds of the jury are not affected thereby. *Ibid.*
6. From the establishment of Territorial government until the jury law of 1903 it was proper to draw judges according to the Hawaiian statutes as amended by the Organic Act. *Territory of Hawaii v. Ng Kow*, 602.

JURIES AND JURY TRIALS.—Continued.

7. Objections to grand jury are waived by failure to object until after verdict. *Tong Kai v. Territory of Hawaii*, 612.
8. The presumption is that grand jurors are good and lawful men and that not less than twelve concur in finding an indictment. *Ibid.*
9. An accused has no right to appear before a grand jury or have witnesses heard by it in his behalf.
10. The statutory provision that juries are exclusive judges of the facts, does not prevent a trial judge from directing a verdict when there are no facts shown upon which a jury could properly base a verdict. *In re Notley*, 700.

JURISDICTION.

1. Equity has no jurisdiction over suit to quiet title where plaintiff's claim of title is by adverse possession and has not been adjudicated in a court of law. *Kuala v. Kuapahi*, 300.
2. Lack of jurisdiction in equity because of an adequate remedy at law may be waived. *Ibid*; *Brown v. Brown*, 308; *McChesney v. Kona Sugar Co.*, 710.
3. It is not a branch of equity jurisdiction to merely construe judgments. *Brown v. Brown*, 308.
4. The Supreme Court has no jurisdiction over election contests. *In re Contested Election*, 323.
5. A court has no jurisdiction to adjudicate that a person is insane and appoint a guardian where no notice of the proceedings has been given the insane person and such defect as to notice cannot be waived. *In re Brash*, 372.
6. A court sitting in probate in the matter of the estate of a deceased person has no jurisdiction to declare a party wrongly acting as guardian to be a trustee and order him to account as trustee. *Ibid.*
7. Attorney's commissions and statutory costs should not be included in determining jurisdiction of a District Magistrate. *Hall & Son v. Dickey*, 590.

LAND.

A Land Commission Award made in the name of a deceased person inures to the benefit of her heirs. *Smith v. Hamakua Mill Co.*, 648.

See COMMISSIONERS OF BOUNDARIES, PUBLIC LAND.

LANDLORD AND TENANT.

1. An award on a fire claim to a landlord "subject to interest of" claim of his tenant is not all payable to the landlord. *In re Colburn*, 4.

LANDLORD AND TENANT.—Continued.

2. Taxes on leasehold interests. *In re assessment of taxes, Lam Wo Sing*, 60.
3. Instruments held to be leases and not merely contracts to establish sugar plantations, and to provide that the sublessees pay all taxes including that on interests of the lessee. *Oahu Ry. & L. Co. v. Ewa Plantation Co.*, 318.
4. A landlord enforcing a forfeiture must comply strictly with the tenor of the lease and a demand for more than rent due and an eviction within ten days thereafter does not put an end to a lease providing for forfeiture in case lessee fails to pay rent when due or "within ten days thereafter and demand therefor". *Mini v. Hilo Sugar Co.*, 480.
5. A District Magistrate may not issue a writ of possession pending appeal unless upon good cause shown and an opportunity given to stay the writ by filing a supersedeas bond. *In re Hutchins*, 624, 672.
6. The payment of taxes may be made a condition of forfeiture of a term. *Cornwell v. Colburn*, 632.
7. A demand for rent as a prerequisite for claiming forfeiture of a lease may be waived in the lease. *Ibid.*
8. It is no defense against forfeiture of a lease for non-payment of taxes that the landlord made no return to the tax assessor, did not pay the taxes or make demand that tenant pay them. *Ibid.*
9. C. L. §1688 requiring defendant in an action of summary possession to file a bond for rent to accrue in order to retain possession pending appeal, is repealed by implication by Laws of 1903, Act 32, providing for executions pending appeals in certain cases if no bond be furnished. *In re Hutchins*, 672.
10. A writ of restitution will not be issued by the Supreme Court upon certiorari without notice to the plaintiff below. *Ibid.*

LICENSES.

The licenses of physicians cannot lawfully be revoked merely because of a defect in the mode of appointment of the Board of Medical Examiners who recommended them. *Ninomiya v. Ke-poikai*, 273.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

MANDAMUS.

No appeal lies from a ruling of the Chief Justice refusing to issue a writ of mandamus. *In re Gertz*, 723.

MARRIAGE.

Evidence held not to prove marriage according to Chinese custom, or common law marriage. *Territory of Hawaii v. Cheong Kwai*, 280.

MEDICINE, LICENSE TO PRACTICE.

See PHYSICIANS.

MINORS.

1. A father is liable for damages caused by careless shooting by his child seven years old. *Victoria v. Palama*, 127.
2. Defects in decision of Supreme Court making it erroneous but not void, may be waived on behalf of minors so as to preclude a collateral attack by them. *Brown v. Brown*, 308.
3. A law is constitutional which forbids the proprietor of any place where liquor is sold to permit any minor to remain in the room where such liquor is sold. *Territory of Hawaii v. Cunha*, 607.

MITTIMUS.

A mittimus to the High Sheriff is sufficient to authorize a prison keeper to hold a prisoner. It is not necessary that the prison keeper be furnished with either a mittimus or a certified copy of the judgment and sentence. *In re Ferreira*, 276.

MORTGAGES.

1. A mortgagee has sufficient title or interest after default by the mortgagor to enable him to bring the statutory action to quiet title against third parties. *Allen v. Lucas*, 52.
2. A mortgagor has no right to redeem mortgaged property after sale under foreclosure. *Brown v. Bannister*, 271.
3. Foreclosure of a mortgage is barred, by analogy, by the statute of limitations applicable to real actions. *Hilo v. Liliuokalani*, 507.
4. No notice to mortgagee of an adverse claim by a mortgagor is necessary to start running of statute. *Ibid.*
5. Foreclosure by entry is not completed until one year after entry and an unlawful attempt may be enjoined any time within the year. *Ibid.*
6. A chattel mortgage without certificate stating fact of acknowledgment by mortgagor, though recorded, is not valid or binding to the detriment of third parties. *Lalakea v. Hilo Sugar Co.*, 570.

MURDER.

1. New trial ordered for error of judge in giving synopsis of evidence of prosecution to jury without referring to that for defendant. *Territory of Hawaii v. Dengiro*, 64.
2. Evidence held to prove murder. *Territory of Hawaii v. Ferris*, 139; *Territory of Hawaii v. Kimura*, 510.

NEGOTIABLE INSTRUMENTS.

1. Promissory notes are not taxable. *In re assessment of taxes, C. Brewer & Co., Ltd.*, 29.
2. In order that the giving of a note by one partner for a partnership debt may preclude an action against the partners on the original debt, all parties to both obligations must understand and assent thereto. *Jan Ban v. Tsen Yim*, 433.
3. Promissory notes which become valueless during the year are losses which may be deducted from income in estimating income tax. *In re taxes, First Am. Sav. & Tr. Co. of Hawaii*, 502.

NEW TRIAL.

1. It is ground for a new trial for a judge in an instruction to the jury to give a synopsis of the evidence for the prosecution without referring to the evidence for the defendant. *Territory of Hawaii v. Dengiro*, 64.
2. Use of intoxicating liquor by a jury is not ground for a new trial if defendant be not prejudiced. *Territory of Hawaii v. Ferris*, 139.
3. On motion for new trial it is proper for the court to amend its record to make it show facts as to presence of defendant at trial. *Ibid.*
4. After conviction, pending appeal, a witness should not be confined to await the possibility of a new trial. *In re Kawahara Yasutaro*, 670.

NUISANCE.

1. One may abate as a nuisance so much of a dam in a stream as interferes with his right of water. *Chee Kit v. Lee Lung*, 69.
2. In an action for assault and battery in resisting an effort to prevent the abatement of a nuisance, it is error after excluding evidence of existence of nuisance to instruct jury that plaintiff was justified in resisting by use of necessary force efforts of defendant in such abatement. *Ibid.*

OATHS.

The Organic Act did not require attorneys to take any new oath. *In re Davis*, 377.

OIL.

See TURPENTINE.

PARTIES.

1. The burden is on a trustee seeking to recover a portion of an alleged trust fund to see that all necessary parties are brought in. *Kellett v. Sumner*, 76.

PARTIES.—Continued.

2. In suits by trustees, claimants of very remote and uncertain interests under the trust need not be made parties. *Ibid.*
3. Mere presence in court in matter of proof of a will does not make a person a party to a hearing as to his own insanity and need of a guardian. *In re Brash*, 372.
4. In a suit against trustees, an amendment changing a defendant is properly denied when no showing is made of the appointment as trustee of the proposed new party. *Mossman v. Damon*, 401.
5. A Deputy Tax Assessor is a proper party plaintiff in a suit for delinquent taxes. *Keola v. Hale*, 419.
6. Petitioners for appointment of a trustee are parties and bound by the decree of the court whether publication be properly made or not. *In re Estate of Holt*, 580.
7. A joint trustee who dies before commencement of an action is not a party thereto though named as defendant and need not be served. *Peabody v. Damon*, 628.

PRESUMPTIONS.

1. Where several judicial acts are performed on the same day, they will be presumed to have been performed in the natural or proper or legal order, in the absence of any showing to the contrary. *Kalaniana'ole v. Dimond & Co.*, 486.
2. The presumption is that grand jurors are good and lawful men and that not less than twelve concur in finding the indictment. *Tong Kai v. Territory of Hawaii*, 612.

PARTNERSHIP.

An action of assumpsit lies by one partner against another to recover money paid to meet the other's share of expenses of the partnership in pursuance of an agreement made prior to the formation of the partnership. *Holmes v. Mello*, 72.

PERJURY.

One is not incompetent as a witness who has committed but has not been convicted of perjury. *Tong Kai v. Territory of Hawaii*, 617.

PHYSICIANS.

The Treasurer cannot lawfully revoke licenses of physicians merely because of a defect in the mode of appointment of the Board of Medical Examiners that recommended them. *Ninomiya v. Kepoikai*, 273.

PLEADING AND PRACTICE.

1. Where a defendant's express promise to pay is nothing more than the law would imply under the circumstances it is optional whether to declare on the implied promise or to set out the contract specially. *Holmes v. Mello*, 72.
2. A complainant has a right before trial to have his case dismissed without prejudice where respondent's interest would not be prejudiced thereby. *Ahlo v. Bolte et al.*, 130.
3. Notice of hearing should be given to an alleged insane person before an adjudication of insanity, though such person is in court. *In re Brash*, 372.
4. Extrinsic evidence is not admissible to cure failure of officer's return to show existence of conditions permitting substituted service of process. *Mossman v. Damon*, 401.
5. In suits against joint trustees service of process must be made on all. *Ibid.*
6. A writ of ne exeat cannot be issued in an action of assumpsit. *Oahu Lumber & Bldg. Co. v. Ding Sing*, 412.
7. Reopening cases to introduce further evidence is within discretion of trial court. *Ahana v. Ins. Co. of North America*, 636. See ATTORNEYS.

PROBATE.

1. A judge sitting in probate in the matter of the estate of a deceased person has no jurisdiction to declare an heir insane and appoint a guardian of her without giving her notice. *In re Brash*, 372.
2. After a person has thus been wrongly appointed guardian a judge sitting in probate in such matter of the estate of the deceased has no jurisdiction to declare such person a trustee and order him to account as trustee. *Ibid.*

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROXIMATE CAUSE.

See INSURANCE, 2, 3.

PUBLIC LAND.

An owner of land abutting on an abandoned street whose free access to his premises is not affected by the abandonment of the street has no right to demand that the land in the abandoned street be first offered to him before its sale to another. *Smith v. Rose*, 289.

PUBLIC OFFICERS.

1. The Governor has not authority to suspend any officer who by the terms of the Organic Act may be removed by the Governor by and with the advice and consent of the Senate and who is to hold for four years unless sooner removed. *In re Austin*, 114.
2. The actions of de facto officers, constituting a Board of Medical Examiners in recommending licenses of physicians cannot be collaterally attacked by revocation of licenses on ground that the officers had been wrongly appointed by the Treasurer and not by the Governor. *Ninomiya v. Kepoikai*, 273.
3. The decisions of a de facto court cannot be questioned collaterally. *Brown v. Brown*, 308.
4. A public officer is not bound to follow advice of Attorney General but may employ other counsel at public expense, when acting in good faith to sustain his conviction of his official duties. *In re Treasurer*, 710.

QUIETING TITLE.

1. A mortgagee has sufficient title or interest after default to enable him to bring a statutory action to quiet title against third parties. *Allen v. Lucas*, 52.
2. Equity has no jurisdiction over suit to quiet title where plaintiff's right of title is by adverse possession and has not been adjudicated in a court of law. *Kuala v. Kuapahi*, 300.
3. The question of jurisdiction may be waived in such a case, will be deemed waived if not raised until appeal and the Supreme Court will not dismiss the case. *Ibid.*
4. The statutory remedy to quiet title does not prevent the remedy in equity. *Brown v. Brown*, 308.

RECORD.

1. The definition of record in Sec. 1446 Civil Laws does not exclude other things necessarily a part of the record, such as the judgment or order itself. *Allen v. Lucas*, 52.
2. Failure to set out in an instrument the true consideration when the difference between the actual and nominal consideration would make no difference in the amount of revenue stamps to be affixed will not deprive the instrument of the right of registry. *Pacific Sugar Mill v. Thrum*, 135.
3. It is the duty of a trial judge to by amendment after close of term make its record conform to the facts as to presence of defendant at trial. *Territory of Hawaii v. Ferris*, 139.
4. The registry of a chattel mortgage without a proper certificate of acknowledgment is a nullity. *Lalakea v. Hilo Sugar Co.*, 570.

REFORMATION OF INSTRUMENTS.

See EQUITY, 7.

REGISTRAR OF CONVEYANCES.

May not legally refuse to register a deed for failure to set out consideration money when stamp duty is fully paid thereon. *Pacific Sugar Mill v. Thrum*, 135.

RES JUDICATA.

A decision discharging a prisoner on habeas corpus though erroneous conclusively determines that he was not liable to be held on the state of facts then existing and if remanded to custody on the removal of the ground of the erroneous decision by the judge rendering it, he should be released on a second application by habeas corpus. *In re Ferreira*, 276.

SENTENCE.

It is not necessary that a prison keeper be furnished a certified copy of the sentence to warrant his holding a prisoner. A mittimus directed to the High Sheriff is sufficient. *In re Ferreira*, 276.

SERVICE.

1. In suits against trustees service must be made on all. *Mossman v. Damon*, 401.
2. It is improper for an officer having returned a writ and shown service of three defendants to file as an amended return an affidavit showing service of a fourth defendant. *Peabody v. Damon*, 628.
3. A writ of error will not be dismissed for failure to serve all defendants within 20 days when attempt has been made to serve all and some have been served, but will give further opportunity to serve the others. *Ibid.*

STAMP DUTY.

1. A failure to set out full consideration in a deed which does not affect the amount of stamp duty will not deprive the deed of right of registry. *Pacific Sugar Mill v. Thrum*, 135.
2. Stamp tax is not assessed upon the contract of sale but upon the conveyance and the consideration money therein expressed, so when several parcels of land are at an auction separately purchased by one buyer and included in one deed the stamp tax should be calculated as upon one consideration and not as upon several separate considerations. *Cooke v. Kepoikai*, 409, 642.

STATUTE OF LIMITATIONS.

1. A Circuit Court judgment is not suspended by exceptions so as to postpone running of six months' limitation within which a writ of error may be issued. *Tibbets v. Pali*, 137.

STATUTE OF LIMITATIONS.—Continued.

2. Statute of limitations runs against a right of dower from the time either the widow or the heir begins to claim adversely to the other. *Kahaleaahu v. Pereira*, 284.
3. Foreclosure of a mortgage is barred, by analogy, by the statute of limitations applicable to real actions. *Hilo v. Liliuokalani*, 507.
4. No notice to mortgagee of an adverse claim by a mortgagor is necessary to start running of statute. *Ibid.*
5. A suit to determine water rights and judgment thereon interrupt running of statute and period of prescription must commence anew. *H. C. & S. Co. v. Wailuku S. Co.*, 675.
6. Evidence held to show adverse possession as against kono-hiki. *Ii Estate v. Mele*, 124.
7. Evidence held to support verdict against adverse possession. *Smith v. Hamakua Mill Co.*, 648.

STATUTES.

1. The provisions of the Audit Act (1898, Act 39) relating to the suspension of the Auditor were repealed by implication by Sec. 80 of the Organic Act. *In re Austin*, 114.
2. Sec. 1507 of Penal Laws does not relate to the storing of pure spirits of turpentine. *Territory of Hawaii v. Fernandez*, 133.
3. Sec. 354 of Civil Laws held not to apply to abutters not injured by closing of a highway. *Smith v. Rose*, 289.
4. Ch. 64 and §484 and §485 of Act 31 of the Laws of 1903 which create a Territorial Board of Public Institutions are invalid. *Dole v. Cooper*, 297.
5. In construing a statute the court may take into consideration the title of the statute, the context, other statutes in *pari materia* and the circumstances under which the statute was enacted. *In re Contested Election*, 323.
6. If the elimination of a part of an Act as void would change the meaning of the remainder, the latter cannot stand. *In re Boyd*, 361.
7. The legislature may properly divide the biennial fiscal period into two parts in contemplation of the inauguration of county government and limit certain appropriations to one portion and others to another portion of that period. *Ibid.*
8. When the valid and invalid parts of an Act are so dependent on each other as to warrant a belief that the legislature would not pass the valid parts independently, the whole must fall, and the County Act of 1903 is therefore void because of void provisions radically changing the Territorial taxation system. *Territory of Hawaii v. Supervisors of County of Oahu*, 365.
9. The legislature may lawfully appropriate money for the

STATUTES.—Continued.

Queen's Hospital, an institution for the relief of indigent sick without distinction as to nationality. *In re Queen's Hospital*, 663.

10. C. L. §1688 requiring a defendant in an action for summary possession to file a bond for rent to accrue in order to retain possession pending an appeal is repealed by implication by C. L. §1435 as amended in 1903. *In re Hutchins*, 672.

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31	"	142, " 7,	In re Contested Election, 329; Oahu Lumber & Building Co. v. Ding Sing, 413; Territory of Hawaii v. Ng Kow, 606.
31	"	143, " 8,	In re Austin, 115; Ninomiya v. Kepoikai, 274.
31	"	143, " 10,	Oahu Lumber & Building Co. v. Ding Sing, 413.
31	"	144, " 14,	Fairchild v. Smith, 266.
31	"	145, " 19,	In re Davis, 383.
31	"	148, " 45,	Dole v. Cooper, 298; In re Contested Election, 331; Territory of Hawaii v. Supervisors County of Oahu, 367.
31	"	148, " 46,	Dole v. Cooper, 298.
31	"	149, " 52-3,	Boyd v. Auditor, 364; In re Hawaiian Star Newspaper Association, 535.
31	"	150, " 54,	Boyd v. Auditor, 364; In re Queen's Hospital, 515.
31	"	151, " 60 and 62,	Fairchild v. Smith, 266.
31	"	152, " 64,	In re Contested Election, 326.
31	"	153, " 68,	In re Austin, 115.
31	"	154, " 72,	Ninomiya v. Kepoikai, 274; In re Treasurer, 719.
31	"	155, " 75,	Dole v. Cooper, 298; Territory of Hawaii v. Supervisors of the County of Oahu, 367.
31	"	156, " 77,	In re Austin, 115.
31	"	156, " 79,	Territory of Hawaii v. Supervisors of the County of Oahu, 367; Kalaniana'ole v. Dimond & Co., 494.
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- 31 " 157, " 83, Territory of Hawaii v. Ferris,
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- 31 " 157, " 84, In re Davis, 379.
- Civil Code, Secs. 257, 261-4, 266, 268, Ch. 15, Kalaniana'ole v. Dimond &
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- " " " 948, In re Hutchins, 626.
- Laws of 1888, Act 8, Kalaniana'ole v. Dimond & Co., 494.
- " " Act 57, Kalaniana'ole v. Dimond & Co., 496.
- Laws of 1892, Ch. 57, Secs. 15, 18, 22, 79, Kalaniana'ole v. Dimond & Co.,
493.
- Const. of 1894, Art. 70, Boyd v. Auditor, 365; In re Hawaiian Star
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- " " Art. 83, Sec. 1, Brown v. Brown, 312.
- Laws of 1898, Act 36, Sec. 16, In re Royal Insurance Co., 11.
- " " Act 39, In re Austin, 115; In re Treasurer, 726.
- " " Act 69, Sec. 9, Dickey v. Honolulu Rapid Transit &
Land Co., 304.
- " " Act 69, " 30, In re Honolulu Rapid Transit & Land
Co., 3.
- Laws of 1901, Act 4, Territory of Hawaii v. Cunha, 607.
- " " Act 15, Sec. 10, In re Royal Insurance Co., 11.
- " " Act 20, " 4, In re First American Savings & Trust
Co., 503.
- " " Special Session, Act 4, In re Hawn. Star Newspaper
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- Laws of 1903, Act 13, Boyd v. Auditor, 363.
- " " Act 31, Fairchild v. Smith, 266; Territory of Hawaii v.
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- " " " " Sec. 10, In re Queen's Hospital, 514.
- " " " " " 11, Oahu Lumber & Building Co. v. Ding
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- " " " " " 454-5, In re Contested Election, 326.
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- " " " " " 464-6, Fairchild v. Smith, 268; In re Con-
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- “ “ “ 1446, Allen v. Lucas, 56.
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- “ “ “ 1529, Austin v. Holt, 417.
- “ “ “ 1632, In re Hutchins, 673.
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- “ “ “ 1674, In re Ferreira, 277.
- “ “ “ 1681, Kalaniana'ole v. Dimond & Co., 489.
- “ “ “ 1678-1688, In re Hutchins, 625, 672.
- “ “ “ 1710-1723, Bank of Hawaii, Ltd., v. Parke, 646.
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STREET RAILWAYS.

1. Where a street railway is obliged by its charter to carry passengers for a five-cent fare upon a continuous trip transferring from one car to another upon a connecting line within certain limits it cannot by a mere rule make a line a connecting one for some purposes and a non-connecting one for other purposes. *Dickey v. H. R. T. & L. Co.*, 304.

2. Passengers on cars of H. R. T. & L. Co. held entitled to transfer free of charge at junction of King street and McCully street lines on a trip from King and Keeaumoku street to Wilder avenue and Alexander street. *Ibid.*

SUMMONS.

1. The officer's return of service must show that the conditions existed on which the statute permits substituted service, and extrinsic evidence is not admissible to prove such conditions. *Mossman v. Damon*, 401.

2. A defect in service apparent upon the face of the return may be taken advantage of by motion to quash. *Ibid.*

3. In a summons the words "judgment will be rendered ex parte by default" are equivalent to "judgment will be rendered upon default according to the evidence taken ex parte." *Kalaniana'ole v. Dimond & Co.*, 486.

4. A policeman is a constable and can serve process of a District Magistrate. *Ibid.*

5. Where service of summons and order of continuance occur on same day the service will be presumed to have preceded the order. *Ibid.*

6. It is proper in serving summons of District Magistrate to show original to defendant without reading it. *Ibid.*

SUPERINTENDENT OF PUBLIC WORKS.

Provisions in County Act of 1903 transferring duties and powers of the Superintendent of Public Works to a Territorial Board of Public Institutions are invalid. *Dole v. Cooper*, 297.

SUPREME COURT.

1. The decisions of the Supreme Court rendered when composed in part of two substitute members cannot be attacked collaterally

SUPREME COURT.—Continued.

on that ground for the court in such cases is a de facto court at least. *Brown v. Brown*, 308.

2. A defect in method of bringing a question to the Supreme Court does not render the decision absolutely void. *Ibid.*

3. The Supreme Court has no jurisdiction over election contests. *In re Contested Election*, 323.

4. A rehearing will not be granted of a disbarment case on ground that one of the judges is a necessary witness and will be called on rehearing, when no such suggestion was made at the original hearing and it is not intimated what testimony would be given if he were called as a witness. *In re Davis*, 377.

5. The Supreme Court of the Territory may disbar a practitioner licensed by the Supreme Court of the Republic. *Ibid.*

6. A rehearing will not be granted on the ground that the petitioner fails to argue certain points on the hearing, or that the court did not notice a certain point in its decision which was in fact considered. *Godfrey v. Kidwell*, 526.

7. The Supreme Court in an equity case will weigh the evidence and make its own findings. *Ibid.*

8. The court will not grant a rehearing merely that the case may be presented again substantially as at the first hearing. *In re Notley*, 700.

See APPEAL.

TAXATION.

1. "Full cash value" in assessing, is the market value, not what it is worth to the owner or its cost of reproduction. *In re assessment of taxes, James B. Castle*, 1; *Kash Co. v. Assessor*, 476.

2. Valuation of street railway's property affirmed. *In re taxes, H. R. T. & L. Co.*, 3.

3. A failure to make return of property exempt from taxation because used for school purposes and to claim exemption is not a waiver of the right to claim the exemption. *In re assessment of taxes, Oahu College*, 18.

4. Stocks and bonds of private corporations, promissory notes and accounts receivable are not taxable. *In re assessment of taxes, C. Brewer & Co., Ltd.*, 29.

5. Under the term "enterprise" as used in the tax laws no property is made taxable which is not included within the definitions of "real property" and "personal property". *Ibid.*

6. When combined property forming the basis of an enterprise for profit consists in part of taxable and in part of non-taxable property and by reason of unity of ownership and unity of use and other intangible elements the aggregate value of all of such

TAXATION.—Continued.

combined property is increased, such increment of value in so far as it is due to the non-taxable property is not taxable. *Ibid.*

7. In ascertaining the aggregate value of all the property owned by a corporation the amount of its debts should be added to the selling price of the shares of its capital stock. *Ibid.*

8. Goods purchased without and not yet within this Territory are not taxable. *In re assessment of taxes, Castle & Cooke, Ltd.*, 50.

9. Leaseholds. *In re assessment of taxes, Lam Wo Sing*, 60.

10. Lessee held to have taxable interest in land after making subleases. *Oahu Ry. & Land Co. v. Ewa Plantation Co.*, 318.

11. Radical changes in the system of Territorial taxation not incidental to county organization when contained in a law creating counties, violate the provision that each law shall embrace but one subject which shall be expressed in its title and render the whole Act void. *Territory of Hawaii v. Supervisors County of Oahu*, 365.

12. Failure to separately assess a lessee's interest in two subleases cannot sustain a collateral attack on the assessment, and is an irregularity that may be waived. *O. R. & L. Co. v. Ewa Plantation Co.*, 406.

13. A Deputy Assessor can recover taxes assessed prior to his incumbency. *Keola v. Hale*, 419.

14. Tax books and assessment rolls are evidence against defendant in a suit for delinquent taxes. *Ibid.*

15. It is proper for a suit for taxes to be brought by a Deputy Assessor in his own name as such Deputy Assessor. *Ibid.*

16. Full cash value of a stock of goods is what they would bring if all sold on the same day for cash, whether as a whole or in lots. *In re taxes, Kash Co.*, 476.

17. In estimating income tax losses of capital used in business may be deducted if they occur during the tax year and this includes bank loans lost during the year though made prior thereto and notes given before but which become valueless during the year. *In re taxes, First Am. Sav. & Tr. Co. of Hawaii*, 502.

18. If land with water rights appurtenant to it is taxed at its valuation including such water rights, the water rights should not be separately assessed. *In re taxes, Booth*, 516.

19. Forest land used in constructing dams, reservoirs, electrical power works, etc., for taking of water is not exempt from taxation under C. L., §897. *In re taxes, John Ii Estate*, 546.

20. Where memorandum of assessment is ambiguous, the construction by the parties before the Tax Appeal Court and by that court itself will prevail on appeal. *Ibid.*

21. The payment of taxes may be made a condition of forfeiture of a term of a lease. *Cornwell v. Colburn*, 632.

SUPREME COURT.—Continued.

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21. The payment of taxes may be made a condition of forfeiture of a term of a lease. *Cornwell v. Colburn*, 632.

TAXATION.—Continued.

22. It is no defense to a forfeiture of a lease for breach of covenant to pay taxes, that the landlord made no tax returns, did not pay the delinquent taxes nor demand payment of the tenant. *Ibid.* See STAMP DUTY.

TREASURER.

1. Injunction lies to prevent the Treasurer from revoking license of a physician merely because of a defect in the mode of appointment of the Board of Medical Examiners that recommended it. *Ninomiya v. Kepoikai*, 273.

2. In controversy between Treasurer and Superintendent of Public Works the Treasurer is not obliged to acquiesce in opinion of Attorney General in favor of Superintendent of Public Works, but may employ other counsel at public expense. *In re Treasurer*, 710.

TIME.

Law takes account of fractions of a day when justice requires it. *Kalaniana'ole v. Dimond & Co.*, 486.

TRUSTS AND TRUSTEES.

1. A fire claim award to one subject to interest of another is not all payable to the one named as awardee. *In re Colburn*, 4; *In re En Syak Aseu*, 7.

2. In order to justify a termination of a trust by consent all interested must consent. *Kellett v. Sumner*, 76.

3. A voluntary deed of trust may be revoked by the grantor, when made without consideration for the grantor's special convenience, a weak-minded aged man acting under pressure and considering it revocable, it being also considered revocable by the trustee and all living beneficiaries, the deed itself containing many indications that it was intended to be revocable though containing no power of revocation. *Ibid.*

4. A trustee of an active trust may sue for the recovery of trust funds without making the *cestuis que trustent* parties if his relations with them are not involved. *Ibid.*

5. A decree in a suit by a trustee seeking to recover an alleged trust fund that he is not entitled to the fund will not be reversed on the ground that some beneficiaries were not made parties. *Ibid.*

6. Directors stand toward the corporation in the relation of trustees and must show that any salaries they vote themselves are reasonable and fair. *Bolte v. Bellina*, 151.

7. A Probate Court sitting in the matter of the estate of a deceased person has no jurisdiction to declare one wrongly appoint-

TRUSTS AND TRUSTEES.—Continued.

ed guardian of the estate of a deceased person to be a trustee and to order him to account as a trustee. *In re Brash*, 372.

8. In a suit against trustees, an amendment as to parties defendant is properly denied when there is no showing of the appointment of the proposed new party as trustee. *Mossman v. Damon*, 401.

9. A legacy made a charge on real estate is subject to payment of debts of estate, and legatee cannot have purchasers of the real estate from the devisee declared trustees if the land has been sold for its full value and the purchase money applied to payment of debts. *Austin v. Holt*, 414.

10. Appointment as "trustee" construed to be appointment as administrator. *In re Estate of Holt*, 580.

TURPENTINE.

It is not unlawful to store more than 10 cases of pure spirits of turpentine on private premises. *Territory of Hawaii v. Fernandez*, 133.

WAIVER.

1. The right of trial by jury may be waived in civil cases by actions or conduct. *Ah Hing v. Ah On*, 59.

2. The fact that a defendant is imprisoned does not affect a waiver of right of challenge of a grand jury through failure to claim right seasonably. *Territory of Hawaii v. Ferris*, 189.

3. A lack of jurisdiction of a court of equity because of adequate remedy at law where the kind of suit is one of equitable jurisdiction, may be waived. *Kuala v. Kuapahi*, 301.

4. Even on behalf of minors. *Brown v. Brown*, 308.

5. Objection to shortness of notice of corporation meeting is waived by attending and taking part without raising such objection. *Brown v. Carter*, 333.

6. Lack of jurisdiction to appoint a guardian of an insane person from failure to give such person notice of the hearing cannot be waived by the alleged insane person. *In re Brash*, 372.

7. Objections to grand jury not raised until after verdict are waived. *Tong Kai v. Territory of Hawaii*, 612.

8. Asking for a *pro forma* ruling against one in order that an appeal may be taken to a higher court is not a waiver of one's rights. *In re Hutchins*, 672.

WARRANTS.

See AUDITOR, 1, 2, 3.

WATER RIGHTS.

1. One may remove so much of a dam as interferes with his right of water in a stream. *Chee Kit v. Lee Lung*, 69.
2. Water rights may not be separately assessed if the land to which they are appurtenant is assessed at its valuation including the water. *In re taxes, Booth*, 516.
3. Water rights in Palolo Valley, Oahu, determined. *Palolo Land & Improvement Co. v. Wong Quai*, 554.
4. Surplus water of an ahupuaa is the property of the konohiki, and is not appurtenant to any particular portion of the ahupuaa. *H. C. & S. Co. v. Wailuku Sugar Co.*, 675.
5. The rights of taro lands to water are prescriptive rights acquired against the konohiki. *Ibid.*
6. A suit to determine water rights and judgment thereon interrupt running of statute of limitations, and period of prescription must commence anew. *Ibid.*
7. It does not necessarily follow from a discontinuance of irrigation of land to which water rights are appurtenant that the right to the water is abandoned. *Ibid.*
8. The burden is upon one making a diversion of water to new lands to make it without injury to others, and to prove that it has been made without such injury. *Ibid.*

WILLS.

1. A bequest to each of three for the life of the survivor, with a bequest over to the survivor in case one or two should die before the testator without leaving lawful issue or wife or husband then surviving, and a further gift over in any event on the death of the survivor of the first three gives nothing to the issue. *Kellett v. Sumner*, 76.
2. Undue influence to vitiate a will must be proved to have operated at the very time of making the will. *In re Will of Notley*, 435.
3. Execution of a codicil expressly confirming a will makes it immaterial whether the will itself were procured by undue influence. *Ibid.*
4. Undue influence, to vitiate a will must amount to fraud or coercion, or the substitution of another's will for that of the testator. *Ibid.*
5. Mere conjecture of undue influence is insufficient to justify nullifying a will. *Ibid.*
6. Evidence held not to show undue influence. *Ibid, In re Notley*, 700.

WITNESSES.

1. Witnesses may not be confined in jail after a criminal trial

WITNESSES.—Continued.

to await a possible new trial ordered by Supreme Court. *In re Kawahara Yasutaro*, 667.

2. One who has committed perjury is not thereby rendered incompetent as a witness unless a statute so provides. *Tong Kai v. Territory of Hawaii*, 612.

3. An accused has no right to have witnesses heard in his behalf by a grand jury. *Ibid.*

WRIT OF ERROR.

1. The statute setting out what shall constitute the "record" does not exclude other things such as the judgment or order itself, which are necessarily part of the record. *Allen v. Lucas*, 52.

2. Exceptions to a judgment do not suspend it so as to prevent the running of six months' limitation as to writs of error. *Tibbets v. Pali*, 137.

3. Writ of error quashed on return that no such case as described in writ was ever pending. *Fitch v. Watson*, 316.

4. Payment of judgment for costs does not prevent plaintiff in an action to quiet title from suing out a writ of error. *Peabody v. Damon*, 628.

5. Service of writ of error need not be made on one named as defendant who died before commencement of action in lower court. *Ibid.*

6. It is improper for an officer after having returned the original writ showing service on three defendants to file as an amended return an affidavit stating service on a fourth defendant. *Ibid.*

7. A writ of error will not be dismissed for failure to serve all defendants but opportunity will be given to make service on all. *Ibid.*

WRIT OF POSSESSION.

Pending an appeal in an action by a landlord for summary possession a District Magistrate may not issue a writ of possession without good cause shown and an opportunity given defendant to stay the writ by filing a supersedeas bond. *In re Hutchins*, 624, 672.

WRIT OF PROHIBITION.

Writ of prohibition dismissed without prejudice when necessity for it appears to have ceased. *Cartwright v. Gear*, 588.

WRIT OF RESTITUTION.

The Supreme Court can issue a writ of restitution in a proper case on certiorari but will not do so in absence of notice to the plaintiff below. *In re Hutchins*, 672.

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